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## Offsetting Risks in Tort Law: Theoretical and Practical Difficulties

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## OFFSETTING RISKS IN TORT LAW: THEORETICAL AND PRACTICAL DIFFICULTIES

*Benjamin Schmueli*

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# OFFSETTING RISKS IN TORT LAW: THEORETICAL AND PRACTICAL DIFFICULTIES

BENJAMIN SHMUELI\*

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## I. INTRODUCTION

According to prevailing tort law, a wrongdoer who can choose one of two courses of action, each having its own risks, and chooses negligently the riskier course of action, i.e., the one that has more expected harm, is held liable for the whole damage he caused to the injured party if the harm materializes. Prevailing tort law considers, therefore, only the harm that actually materialized and does not consider that there was also a risk of causing harm in the alternative that was not chosen, even if a lower one. That being the case, prevailing law examines only what happened in practice and ignores what would have happened if the injured party had been exposed, with certain probability, to other risks, even if lower, had the reduced-risk course of action been chosen.

Professor Ariel Porat has recently presented in a series of essays what he refers to as the Offsetting Risks Principle (ORP), which is primarily relevant to medical malpractice cases but could also be suitable, in his opinion, for tort law in general.<sup>1</sup> According to this

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1. See generally Ariel Porat, *Offsetting Risks*, 106 MICH. L. REV. 243 (2007) [hereinafter Porat]. An earlier version of the article was first published in Hebrew: Ariel Porat, *Excessive Liability, Offsetting Risks and Defensive Medicine*, 30 TEL AVIV L. REV. 9 (2006) (translated by author) [hereinafter Porat, *Excessive Liability*]. Part of the idea appeared in an earlier article of which Porat was a co-author: Robert Cooter & Ariel Porat, *Liability Ex-*

principle, there is need for legislated change in the prevailing legal outcome whereby liability is imposed on injurers who have negligently chosen a course of action that caused harm to a patient, while a different choice was available to them which entailed a lower risk. According to Porat's ORP, courts should account for the risks decreased by the wrongdoing as a factor mitigating liability.

Part II of this Article will explain the ORP as presented by Porat and outline some of the basic principles of tort law and how they relate to the ORP. Part III will discuss problems arising from an analysis of the ORP and its application. Some of these problems are practical in nature and concern matters of calculation, and some relate to an understanding of the underlying basis for the principle. Part IV will analyze and criticize the comparison made by Porat between the ORP and theories of probabilistic causation—the lost chance and increased risk doctrines. Part V will discuss the incompatibility of the principle with most of the goals of tort law given all of the problems raised in this Article.<sup>2</sup>

The Article concludes that the proposed principle raises several, very serious problems: some inherent normative problems that derive from its incompatibility with most of the goals of tort law, and other technical problems that make its practical application difficult, if not impossible. Accordingly, it will be my recommendation in this Article that, although problems do exist in medical malpractice cases and tort law in general, the ORP should not be applied as presented. This is because, despite the specific problem of defensive medicine and the overinvestment in precaution that it attempts to remedy, the principle is very likely to complicate the present situation in many respects, make litigation more costly, and make it tangibly harder to evaluate the evidence in medical malpractice cases and other tort cases.

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*ternalities and Mandatory Choices: Should Doctors Pay Less?*, 1 J. Tort L. art. 2 (2006). This article refers to medical treatments only and not to the other types of the negligent activities discussed in the latest articles. The Michigan article is more comprehensive, and therefore the other two articles will be cited only insofar as they deal with relevant issues not covered by the Michigan version. A short comment on Porat was published in the same JTL issue: Keith N. Hylton, *Liability Externalities and the Law: A Comment on Cooter and Porat*, 1 JTL art. 3 (2006). Hylton supports, in principle, Cooter and Porat's proposals and the reforms that they suggest and does not share the fundamental criticisms raised in this Article. His criticism is relevant to some of the details of Cooter and Porat's proposal but is not directed at the theoretical framework. See *id.* at 1-2. He also raises some alternatives for solving the problem of defensive medicine. See, e.g., *id.* at 1, 5. In any case, the bulk of this critique is significantly different from the criticisms to be raised in this Article. Hence, Hylton's criticisms will be mentioned only insofar as they are related to the points to be raised here.

2. This part of the critique has been left for the end of the Article because the theoretical critique will be clearer after analyzing the serious problems arising from the ORP.

Nonetheless, if the inherent problems that arise from the analysis of the ORP and its application could be solved, or if the ORP were to be presented in another way, there could be, with all due respect, a place for its application in legislation and case law. However, under present conditions, it is hard to believe that these difficulties could indeed be resolved and that the ORP could be consistent with the goals of tort law.

## II. A PRESENTATION OF PORAT'S OFFSETTING RISKS PRINCIPLE AND TRADITIONAL TORT LAW PRINCIPLES

As stated above, Porat believes there is need for legislated change in tort law in regard to injurers who have negligently chosen a course of action that caused harm to a patient, while a different choice was available to them which entailed a lower risk. Under Porat's ORP, courts would account for the risks decreased by the wrongdoing as a factor mitigating liability.

Porat illustrates this with a basic example of a doctor who has to choose between Treatment A, entailing a risk of \$500 (i.e., there is a probability of .1 that a treatment will produce a harm of \$5000), and Treatment B, entailing a risk of \$400 (i.e., there is a probability of .1 that the treatment will produce a harm of \$4000). The doctor negligently chooses the former, causing a harm of \$5000; the expected harm from the negligent choice of Treatment A materializes into an actual harm.<sup>3</sup> According to prevailing law, this injurer is liable for 100% of the harm—\$5000 in the given example—even though, as Porat sees it, his negligence actually created a liability of only 20%. Although his negligent conduct created a risk of \$500, it also eliminated a risk of \$400—a reduction of 80%—because he did not choose Treatment B, which entailed a probability of .1 of a harm of \$4000.

Porat characterizes the heightened liability currently imposed on doctors as “excessive liability.”<sup>4</sup> Under Porat's ORP, the risk posed by the nonnegligent choice should be offset against the risk of the negligent choice. This means that injurers would only need to pay the difference in percentages between the expected harms (20% of the actual damages caused, or \$1000) instead of the full harm that materialized (\$5000). In this way, the injurer is not just held liable (perhaps even “punished”) for negative externalities, i.e., for creating said realized risk of \$500, but also credited for positive externalities, i.e., for preventing the risk of \$400. Thus the injurer is only liable for the net risk that he created. According to Porat, the only way to truly reflect the social costs of a wrongdoer's conduct and rectify distortions in

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3. Porat, *supra* note 1, at 245. Note that the probabilities of the two risks need not be identical—the numbers used here were chosen for convenience only.

4. *Id.* at 246.

prevailing law is to impose upon the wrongdoer the reduced liability that results from offsetting risks.<sup>5</sup>

Porat presents a formula to be used for applying the principle:

$$L = ((r_A - r_B) / r_A) \cdot h_A^6$$

He explains that “when the same wrongful act that increased the risk that eventually was realized ( $r_A$ ) reduced another risk ( $r_B$ ), liability ( $L$ ) should be equal to the harm that materialized ( $h_A$ ) multiplied by the difference between the two risks ( $r_A - r_B$ ) and divided by the risk that was realized.”<sup>7</sup> If the formula is applied to the example, the wrongdoer would be held liable for \$1000:  $L = \$5000 \times (\$500 - \$400) / \$500 = \$1000$ .

Porat calls for an adoption of the ORP into legislation as it relates to medical malpractice, if not all torts as well. He explains the compelling logic, in his opinion, for adopting this principle and the notion that its statutory application would lead to a lower investment by doctors in precautionary measures, whereas the current state of affairs is characterized by an overinvestment in such measures to avoid mistakes.<sup>8</sup> There is also a danger that excessive liability might cause a reduction in or even the elimination of beneficial activities, even though this outcome is socially undesirable.<sup>9</sup> Porat also argues that excessive liability results in unnecessary surgical procedures, examinations, and medication; creates litigation costs; and increases the attorneys’ income—all at the expense of patients.<sup>10</sup>

Porat argues that applying the ORP would reduce the scope of defensive medicine,<sup>11</sup> lower the cost of health care, improve the quality of health care, and help optimize the standards of various medical activities.<sup>12</sup> He believes that it is in the patient’s interest, *ab initio*, to be awarded partial compensation (i.e., reduced compensation after risks have been offset) to improve doctors’ incentives to provide better care and ultimately to increase his own profit.<sup>13</sup> According to Porat, the legislature’s adoption of the ORP will also lead to a signifi-

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5. *Id.* at 245-47 (“An injurer who fails to take these precautions creates a net risk equal to the difference between the risks he negligently failed to reduce and the risks he would have created had he taken the necessary precautions. I call the latter risks offsetting risks.”).

6. *Id.* at 251.

7. *Id.*

8. *Id.* at 266-67.

9. *Id.* at 263, 266-67.

10. *Id.* at 246, 264-66, 275.

11. *Id.* at 246, 264-66; *see also id.* at 264 n.47 (listing references discussing the problem of defensive medicine).

12. *Id.* at 264-66.

13. *See id.* at 246, 264.

cant reduction in the huge compensation awards paid as a result of medical malpractice lawsuits, which send the system into a spin.

Porat proposes that risks related to the interests of the victim be offset by the decreased risk that might have been realized by the nonnegligent course of action that was not ultimately chosen. However, he also presents—although he does not propose to actually or necessarily implement this—the possibility of similarly offsetting risks to third parties or even to the aggregate social interest that were avoided and decreased by the negligent choice of a course of action. He argues that this reflects a natural application of optimal deterrence.<sup>14</sup> To implement this theory into practice would constitute a significant expansion of the ORP and its application.

However, Porat does not propose that victims be left without any compensation for the alternate risk. He proposes that the difference—i.e., 80%, which is \$4000 in the given example—be supplemented by social or private insurance available for purchase by the injured party.<sup>15</sup>

In fairness, Porat notes that acceptance of the ORP might encourage doctors and other potential injurers to artificially increase the anticipated offsetting risks to reduce the extent of their liability should harm eventually materialize.<sup>16</sup> He asserts that a possible solution for this is to divide offsetting risks into two categories: risks that are present even without this artificial increase (which should be offset) and artificial risks (which should not be offset).<sup>17</sup>

Porat's suggestion is innovative and different from the traditional tort law treatment of the issue of risks and chances. Tort law treats risks in a complicated, nonuniform way throughout the world. This Article is not exhaustive, but it will mention a few basic principles relevant to the issues at hand:

(1) *Tort law does not create liability for pure risks that do not materialize into actual harm even if it is clear that, had this risk materialized, it would have entailed a tort.* This is what I will refer to as an “incomplete tort.” For example, consider if a government ministry or a municipality negligently placed a road sign, and the outcome was increased risk to the drivers and pedestrians traveling near it. As long as no damages occur (not even a minor waste of time) and no expenses were caused as a result of this negligent action, neither drivers nor pedestrians who pass nearby can sue the authorities for placing them at risk. Therefore, in this type of case, offsetting risks are not relevant. This is an incomplete tort. There is a duty of care, and

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14. *Id.* at 252-60.

15. *Id.* at 270-71.

16. *Id.* at 273 n.71.

17. *Id.*

one may assume that it was breached, but merely placing someone at risk does not constitute a tort if no harm was caused. In these cases, it is clear that exposure to risk cannot be a basis for liability.

(2) *When risk materializes into harm and all of the cumulative elements of a tort exist, including causation, tort law creates liability for the whole damage.*

(3) *When someone is exposed to a risk that materializes into damages, but there is difficulty proving a factual causal relationship, in some countries a partial compensation is recognized, and its magnitude is similar to the magnitude of the increase of the risk.*<sup>18</sup>

(4) *In some countries, tort law deals with a situation in which the risk that a person will be harmed or become ill increases following some act or omission, even if harm does not materialize, because the negligent act caused that person to suffer additional expenditures.*<sup>19</sup> For example, a person may be exposed to increased radiation or to increased pollution following a tortious action, such as pollution discharged from a factory or radiation from a cellular antenna. If the person is not currently ill, the tort is missing the prima facie element of harm. However, emotional harms, such as the fear of becoming ill, can be a recognized harm. If a plaintiff is healthy at the time of trial and the exposure to the risk has not affected him physically or mentally, but he must now incur special expenses for increased periodic medical examinations, in some countries the wrongdoer must compensate him for these expenses. This is especially relevant in countries where medical insurance is private, not national, because some of these examinations, e.g., imaging or blood tests, are very expensive.<sup>20</sup>

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18. Its converse is partial compensation based on the probabilities of the loss of chances to recover both. Issues will be dealt with below in connection with offsetting risks.

19. In countries recognizing torts under this fourth principle, indemnity for aggravated medical expenses is generally in addition to physical damages. This is the case in some states in the United States regarding increased risk. *See* *Dillon v. Evanston Hosp.*, 771 N.E.2d 357, 366-372 (Ill. 2002) (awarding future expected damages for a patient's increased risk of developing infection after the doctor negligently left medical equipment within the patient's body); *Mauro v. Raymark Indus., Inc.*, 561 A.2d 257, 264 (N.J. 1989) (awarding damages for increased risk of contracting diseases resulting from plaintiff's exposure to asbestos during employment). It is only in isolated instances that such aggravated medical expense damages have been awarded in the absence of proven associated bodily harm. *See, e.g., Simmons v. Pacor, Inc.*, 674 A.2d 232, 239 (1996) (awarding compensation for costs of medical surveillance to plaintiff for the future risk of developing cancer resulting from exposure to hazardous materials even though the plaintiff did not prove any present harm or injury at the time of trial); *see also* Deidre A. McDonnell, *Increased Risk of Disease Damages: Proportional Recovery as an Alternative to the All or Nothing System Exemplified by Asbestos Cases*, 24 B.C. ENVTL. AFF. L. REV. 623, 647-49 (1997) (arguing that plaintiffs should be allowed to recover proportional damages when a negligent action substantially increases their risk of developing disease).

20. It is possible that some of these examinations may increase the risk of becoming ill, for example treatment following an exposure to radiation.



The ORP, as presented by Porat, does not distinguish completely between principles one and two presented above. To explain it, let me return to Porat's main example. As stated, the doctor has negligently chosen Treatment A, with an expected harm of \$500, while the expected harm from another option, Treatment B, is only \$400, and, in fact, an actual harm of \$5000 has materialized. Porat claims that the injurer should only pay 20%, which is \$1000. In a pure analysis of risks, it might seem logical, maybe even necessary.

However, it does not fit the traditional perspective of the law of negligence, since the choice of Treatment B would not be considered negligent at all, even though it also entails a risk (although reduced compared to Treatment A) that harm will be inflicted. This is the "incomplete tort." Treatment B entails harm and there is a causal relationship between the act and the harm, but the choice of Treatment B is not deemed negligent because there is another treatment with a higher expected risk. Treatment B is not a materialized risk, and even if it had materialized, would not have been a tort at all. Therefore prevailing tort law justifiably does not consider it.

Porat proposes that the prevailing law be changed. He wishes to compare the risk *that is realized* as a result of an act, the very choice of which *constitutes a wrong*, with the *potential* risk from an act that, had it been chosen, *would not be considered wrongful at all*. The entire principle is based on a comparison between tortious and nontortious activity, where in both cases there is potential for harm to materialize.

Porat suggests that the avoided risk associated with the nonnegligent alternative should be offset against the negligent risk that is realized into a harm and that the failure to offset risks should be viewed as a "windfall" to the plaintiff.<sup>21</sup> According to traditional tort law, liability arises from the infliction of harm and not from the mere creation of a risk; and when the latter is realized, damages should be awarded for all of the harm sustained. This comparison to an act or omission which is not considered a tort is contrary to the regular rules of examination of the cumulative elements of a tort.<sup>22</sup>

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21. Porat, *supra* note 1, at 270-71 ("[T]he definition of 'harm caused by the doctor,' as opposed to 'harm caused by nature,' is, at the very best, unclear. A patient who might have been nonnegligently exposed to an expected harm of 400 but instead was negligently exposed to an expected harm of 500 which was realized into an actual harm of 5000, and is compensated for that harm—could be considered to have received a windfall. The reason for that is that, had the doctor nonnegligently exposed her to an expected harm of 400 and that risk materialized into an actual harm of 4000, the victim would have remained completely uncompensated!").

22. Not only should compensation not be reduced, as Porat proposes, but under proper circumstances, in accordance with court rulings on this matter in various countries like Israel, breach of autonomy should be added as a head of damage to the traditional award for bodily injury. *See, e.g.*, CA 2781/93 Daaka v. Carmel Hosp. [1999] IsrSC 53(4) 526.

There is nothing wrong with innovation itself. On the contrary, there is no justification for stubborn adherence to the traditional perception of tort law at all costs. However, an examination of the ORP from both a theoretical perspective of the goals of tort law and in regard to the possibility of its practical application raises difficult questions as to its compatibility with the current legal reality of medical malpractice cases and of tort law in general. A careful analysis reveals several serious, inherent problems with the central example that Porat uses to illustrate the principle, as well as with other examples that he presents in his article. These problems make the actual implementation of the principle very difficult.

### III. INHERENT PROBLEMS ARISING FROM THE NARROW INCIDENCE OF THE PRINCIPLE AND IN CALCULATING AND OFFSETTING THE EXPECTED HARMS

The ORP as presented can, in principle, be suitable only to the type of cases that were presented by Porat, i.e., when the negligence was caused by the choice of a certain course of action as opposed to another one; the negligence lies in the poor choice. Nevertheless, other cases of medical malpractice—if not the majority of them, then at least a large portion of them—do not reflect a negligent choice of the course of treatment but negligence in carrying out or omitting to carry out the treatment itself. A large number of medical malpractice cases relate to surgery done with insufficient care; surgery that was done too late; failure to obtain fully informed, conscious consent from a patient for the treatment; or omissions such as forgetting a surgical pad inside the patient's body or not discovering a tumor in time despite the ability and need to do so under the circumstances. These are not cases that involve any issue of choosing negligently between courses of action unless we artificially say that the doctor had, for example, two courses of action—to forget the surgical pad or to remove it.<sup>23</sup>

Given this limitation, it seems claiming that the problem of defensive medicine would be solved or even lessened if the ORP is applied is somewhat pretentious since the ORP does not relate to many types of medical malpractice cases. Moreover, Porat's call to examine the possibility of expanding the use of the ORP beyond medical malpractice cases to all negligent actions in tort<sup>24</sup> is problematic because it is not clear why it is necessary to create a separate principle, different from the prevailing law and compatible only with a narrow scope of cases in which a wrongdoer has two (or more) courses of action and

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23. Cf. Hylton, *supra* note 1, at 4 ("Negligence claims usually do not involve general methods or approaches, such as the choice between boat or airplane transportation or the choice between cesarean and vaginal delivery.").

24. Porat, *supra* note 1, at 269, 275-76.

negligently chooses the riskier one. Only in those cases would liability be partial; in all other cases it would be full. There is no justification for this distinction, especially given that, in cases other than medical malpractice, there is no defensive medicine problem.

Therefore, the acceptance of the ORP in legislation or case law will create an enormous change in tort law that will substantially affect litigation costs and procedures, as detailed below. Moreover, let us not forget that most specific arrangements in tort law are based on negligence and fault. The general rule of this liability regime is that a wrongdoer at fault is *fully* liable for the harm caused, and a reduction in liability is possible only due to contributory negligence.

Even were we to accept the division of negligence law into two distinct doctrines—the doctrine of offsetting risks and the traditional doctrine of fault without offsetting risks in all other instances—there is still a problem in dealing with cases where there are several non-negligent courses of action and difficulty and expense calculating and offsetting the expected harms.

The comparison that Porat makes in his basic example, between a negligent choice of a course of action with a risk of \$500 and a non-negligent choice of a course of action with a risk of \$400, is too sterile. In that case (if one ignores the above-mentioned problems with calculating and offsetting expected harms) 80% of the actual harm of \$5000 will be offset. However, what would be the outcome in cases where there are more than one nonnegligent, medically reasonable courses of action? Assume that there are three additional nonnegligent, medically reasonable courses of action in the previous example: one course of action with an expected harm of \$300; another course of action with an expected harm of \$200; and, finally, an option to do nothing at all under the circumstances (for instance, a decision to not remove a tumor) with a risk of \$100. Although Porat's formula is written to be applied to situations with more than two alternative courses of action, his examples focus on situations with only two reasonable courses, such as the example given from the field of obstetrics where, in a given case, a doctor negligently opts to perform a vaginal delivery that results in harm to the baby and fails to choose a cesarean delivery which would not be considered negligent in said circumstances but which carries dangers of its own.<sup>25</sup>

As we will see below, the comparison between the two choices is inherently problematic.<sup>26</sup> But, if we stick with Porat's reasoning, there is another problem—a cesarean delivery could entail risks of

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25. *Id.* at 264-65; Cooter & Porat, *supra* note 1, at 1-3.

26. See Porat, *supra* note 1, at 270-71; Cooter & Porat, *supra* note 1, at 25; see also Hylton, *supra* note 1, at 3-4 (suggesting an alternative solution for the obstetrician example based on factual causation that does not require any changes to the rules on damages awards).

different types of harm. And, under certain circumstances, there may be other choices available to the doctor (such as vacuum extraction or forceps delivery) also entailing risks of different harms and varying degrees of probability. (Again, the model itself is written to include varying levels of probability applying to different risks. It is only the practical evaluation of such probabilities that is problematic.) Comparing the risks of the course of action where one choice is negligent and the other is nonnegligent can be difficult, if not impossible, particularly in the field of medicine where the same treatment may pose different risks to different patients.

Should we choose the option that most favors the injurer by offsetting the risk generated by the reasonable, nonnegligent course of action that could have led to the highest degree of harm among the less risky courses of action? Or should we choose the alternative that most benefits the victim, offsetting the risk that would have led to the largest possible differential? Would it be logical to take all possible positive externalities into account cumulatively which, in many cases, would lead to a situation where the injurer would not have to pay any compensation at all, even though it is clear that his actions were negligent? In my opinion, this last option is totally unacceptable since a comparison must be made between the risk of one negligent course of action and another nonnegligent course of action, and not between the risk of the negligent choice and an aggregation of risks from various nonnegligent choices.

Ostensibly, Porat has an answer: “[W]hen the injurer could have chosen among more than two options,  $r_B$  [the lower risk that eventually was not realized] should be the risk entailed by the most reasonable option among the various alternatives available to the injurer.”<sup>27</sup> With all due respect, this is indeed a logical and maybe even required answer. However, how might one in practice determine this “most reasonable option among the various alternatives available to the injurer?”<sup>28</sup> The problem lies, therefore, in the fact that there is a domain of reasonableness; that is, there are instances in which there are a number of reasonable courses of action, rather than just two—one more risky and the other less so.

Courts do not determine which nonnegligent course of action is the most reasonable. They only examine if the chosen course of action is in that domain of reasonableness. There could be infinite courses of actions in this range, or at least more than one. The reasonableness of medical treatment courses of action is determined by a number of factors. Is the determination related to the magnitude of the expected harms? Note that a more probable course of action may be related to

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27. Porat, *supra* note 1, at 251-52.

28. *Id.* at 252.

a smaller harm and vice versa. Will each case be determined on its own? Porat does not clarify any of that, so it is ultimately unclear which of the risks should be offset against the risk posed by the negligent course of action that was actually chosen. Porat proposes that the courts be provided with risk tables, to be established through legislation, in order to guide them in the analysis.<sup>29</sup> But is it possible for the legislature to provide such tables for each individual case, or to each group of cases? How, ultimately, would it be possible to handle the existence of a number of acceptable, reasonable courses of action, and how would such tables actually solve the problems raised here?

It would appear to be too complicated to calculate the risk of a harm that has actually materialized and then to deduct from this a risk that has not been realized because said course of action was not chosen. The multitude of necessary calculations is problematic and could send the legal system into a spin. It would entail numerous calculations of expected harms for different courses of treatment or the expected harms of omissions, like refraining from medical treatment, as well as a calculation of the probability of the realization of each risk for every possible course of action.

Following this logic, it would be necessary to compare the risk of the negligent choice with those of all other possible courses of action, which could be infinite. In such cases it is not clear how it would be possible to calculate and offset the various expected harms with different probabilities. In most cases it is not certain that harm will result from alternative courses of action. This is just a matter of probabilities, some with small magnitudes that are, for example, far from preponderance of evidence (like 10% in Porat's primary example). Conducting this analysis would make lawsuits more costly and require the routine testimony of numerous medical experts to evaluate the risks of all possible courses of action that could have been chosen under the circumstances. It would also require the testimony of experts in statistics who would have to evaluate the probability of each course of action, compare the probability of the action that was chosen with each course of action not chosen, and calculate the difference.

In truth, it may be said that the examples Porat relies on are cases in which there are only two courses of action to begin with, and it is clear which one is the negligent choice and which one is the non-negligent choice; the theoretical formula, however, can be applied to other situations. However, the problem of how to calculate and offset various risks also exists in the sterile examples presented by Porat throughout his article and would only be reduced if it were known with certainty, or at least by a preponderance of evidence, that harm would *indeed be caused* by the nonnegligent choice and to what ex-

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29. *Id.* at 272-73.

tent. This only becomes more problematic given the existence of additional, nonnegligent courses of action and background risks.

Beyond that, even if Porat had only intended to apply the ORP to cases in which there are only two courses of action, where choosing one of them is negligent and choosing the other one is not, one cannot ignore its broader necessary application in cases where there are two or more nonnegligent courses of action. If the intention is to apply this principle only where two courses of action exist, one involving greater risk and the other involving less risk, then we are limiting even further the applicability of the principle, which is already limited in scope and which requires the application of two doctrines in negligence law. It is therefore hard to establish what might be considered a truly revolutionary evidentiary rule for tort law based solely on such a sterile case entailing only two courses of action, especially given the fact that the ORP is narrowed from the start to certain types of cases.

Furthermore, there are serious problems even if the ORP is implemented only in situations in which there are only two courses of action because in these situations it may be that one course of action entails risks of different harms of varying degrees. Sometimes even *one* course of action can lead to multiple harms, and this too must be taken into consideration. For example, a nonnegligent course of treatment entails a risk of \$400, but it also entails a risk of harm of \$50 or \$250 from serious side effects that may result from the same treatment (such as the loss of hair, loss of appetite, or impotence associated with chemotherapy). Which of these risks should be offset against the risk that is actually realized from the negligent choice of treatment? The highest risk? The lowest risk? The overall cumulative risk? In addition, it may be that each of those three courses of treatment involves different risks for different harms, complicating the issue even more.

But this is not the end of the problem. Even if we settle on a case in which there are only two courses of action and apply the ORP only in that case, and even if we ignore the problems presented until now, there is still no way of knowing whether the course of action not actually chosen, Treatment A, would indeed result in a harm. This is particularly true when the alternative course of action has a lower expected harm, and even if the risk would have materialized, the choice of this course of action would not, in and of itself, constitute a tort at all. Thus, there is no justification for offsetting, and the imposition of full liability should not be viewed as excessive, as Porat believes.

To illustrate the problems involved, I will use a different example than Porat's, one in which the difference between the risks is considerable. Let us assume that the negligent choice, Treatment A, car-

ries a 40% risk of harm, and the nonnegligent choice, Treatment B, carries only a 5% risk of harm.<sup>30</sup> A patient could perhaps argue that he was injured by negligent Treatment A, with a 40% risk, because he is more susceptible than others (i.e., than 60% of the population) to its dangers; whereas he is not as susceptible to the dangers of nonnegligent Treatment B, with only a 5% risk. Therefore, a patient might not have fallen into the latter category at all and not suffered any injury from this choice, making it illogical and unjust to offset such an unlikely, speculative risk.

Simply stated, there is no way to prove that the victim would have suffered harm from a course of action that was never taken. It would be hard to find a doctor who would testify that Treatment B, which was not administered, would have led, with certainty, or at least by a preponderance of evidence, to a specified extent of harm. It is impossible to know in advance and prove how a person will react to a specific type of treatment.

Porat believes that, under prevailing law, the injurer, in effect, bears liability that is higher than the harm caused by his negligence (what he calls “excessive liability”).<sup>31</sup> However, this is the *actual* harm caused by his negligence and no more; therefore it reflects his net liability and is not excessive. Let me explain it with an example given by Porat—that of overlapping risks.<sup>32</sup> Suppose a nonnegligent course of action creates four risks, while a negligent course of action produces an additional fifth risk. Porat provides for this in an example of risk to four of a patient’s fingers (with a .1 probability that harm of 4000 will occur) as opposed to a risk to five of his fingers (with a .1 probability that harm of 5000 will occur), where choosing the latter option is a negligent choice.<sup>33</sup> True, when the risks are overlapping, one might feel that the doctor should be liable only to the extra risk. However, if all of the elements of the tort have been proven then the victim must be awarded full compensation, subject to any finding of his own contributory negligence.

Choosing the riskier course of action fulfills all the elements of the tort. In the example of overlapping risks, the elements are fulfilled—to the fifth risk as well as to the other four. True, if there is certainty, at least by a preponderance of evidence, that all four elements of the

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30. This is only for the sake of the argument with no intention to involve the expected harms. Sometimes a small probability of a large damage means a bigger expected harm than a big probability for a small damage, as illustrated by the following: Course of action A—a harm of \$200 with a probability of 90%. The expected harm is \$180. Course of action B—a harm of \$4000 with a probability of 5%. The expected harm is \$200. Choosing course of action B is negligent according to the ORP even though there was a 95% probability that the harm would not materialize.

31. Porat, *supra* note 1, at 246.

32. *Id.* at 249-50.

33. *Id.*

tort would have been fulfilled by choosing the less risky course of action, one might argue that there is no factual causation between the negligent act and the first four risks but only the fifth one.<sup>34</sup> But there is no certainty in this since there is a possibility of 90%, according to the example, that the harm to the four fingers would not have happened had the less risky course of action been chosen. This is far from certainty or a preponderance of evidence.

Tort law today would justifiably hold the wrongdoer liable for the risks materialized to all five fingers. The compensation will not be reduced until it can be proven, at least by a preponderance of evidence, that damage would have occurred to the four fingers had the nonnegligent choice been made. Porat demonstrates the ORP from probabilities which are under 50% and not beyond it. The ORP is built, due to its nature, on risks and not on certainties or probabilities above 50% necessarily; therefore one cannot assume that there is some certainty in causing harm in the overlapping risks example.

Let me present another example. Suppose that to save a patient's life it is necessary to remove one of his eyes, and the doctor saves the patient but negligently removes both of his eyes. It is clear in this example that the doctor's negligence derives from the fact that he also removed the healthy eye, an act that was unnecessary to save the patient. But a new principle of offsetting risks is not required to reach such an outcome. In this clear-cut example it is obvious that there is only a causal relationship between the negligent act and the additional harm it caused. This is actually offsetting pure *harms* and not risks, which is in accordance with principle number two presented in the introduction. Porat's ORP, as demonstrated by his main example, does not relate to such cases, but only to cases where there are *probabilities*, even low, of the occurrence of harm as a result of choosing the less risky, nonnegligent course of action.

Therefore, Porat's argument that there are two causes of injury here: one that is not wrongful (which would have occurred anyway), with a magnitude of harm of \$4000, and another that is wrongful, with a magnitude of harm of \$1000, is unsounded. There is only *one* cause of injury here, with a magnitude of harm of \$5000. The prima facie harm of \$4000 that might have been caused by the nonnegligent choice never actually materialized and might never have; in the main example there was only a probability of 10% that it would materialize. The harm caused by the negligent choice neither added to nor did

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34. See *id.* at 249 (citing Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 71 (1975) (explaining that the wrongdoing must also satisfy the causal link condition: its recurrence must increase the chances that the injury will occur)).



it occur simultaneously with another existing harm. In effect, the actual harm that was caused materialized independently.

Porat argues that the injurer must pay the injured party only \$1000. However, if the magnitude of wrongful harm is only \$1000, then why is there a need to compensate the victim for the additional \$4000—through social or private insurance, as Porat proposes<sup>35</sup>—if this difference of \$4000 does not stem from any wrongdoing? Does Porat only want us to notice that a person who is injured, but not from a tort, can purchase insurance and in this way be compensated for harms that are not covered in tort law; or maybe Porat also understands that the difference that was offset is actually a harm that needs to be compensated in tort law too?

People suffer various common injuries in their daily lives, injuries that do not originate in a tort, but in competition or other activities. In many cases there is no insurance or other factor to compensate them for such injuries, so they must bear it themselves. One must conclude that the entire \$5000 is a wrongful harm and the injurer must pay full compensation for it. If the victim must be referred to private insurance to make up said difference of \$4000, then this is not compensation for a wrong. A person may insure himself to his heart's desire, pay the necessary insurance premiums, and receive compensation irrespective of the question of someone else's negligence. In any event, this rationale for the ORP is all the more problematic in the cases discussed further on in this Article where, according to Porat, the negligent course of action avoided risks of harms to a third party or society at large and should also be offset.<sup>36</sup>

Even the example that Porat gives from the field of obstetrics<sup>37</sup> seems problematic for the purpose of establishing the ORP. If a doctor negligently opts to perform a vaginal delivery resulting in harm to the baby, in Porat's opinion, the risks from a cesarean delivery, which, in principle, entails higher risks than a natural delivery, should be offset, thus reducing the liability of the doctor who negligently chose to perform a vaginal delivery. According to medical literature and statistics, the given risks of a cesarean delivery should not be considered at all. These are general risks that are always present, and if it is found that the choice of a vaginal delivery was negligent, then all of the harm should be placed on the doctor's shoulders. The rationale is that the choice of a cesarean delivery, under the circumstances, would *not* be considered negligent even if it entailed a

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35. *Id.* at 270-71; Cooter & Porat, *supra* note 1, at 25.

36. In fairness, Porat does not wholeheartedly recommend that the ORP be applied to offset such third-party risks but rather believes that, in accordance with the goal of optimal deterrence, this should be the outcome of the application of ORP.

37. Porat, *supra* note 1, at 264-65.

risk of harm—and even if this was a high risk in comparison to a normal vaginal delivery.<sup>38</sup>

Let me present an example from another field, that of a construction engineer who has a choice of two possible materials for the purpose of installing the floor/ceiling between two stories of a building: Material A, which is less stable, and Material B, which is more stable. Neither material is stable in an absolute sense (the assumption is that there is no 100% stable material that suits this work), and the use of either of them creates a potential risk; however, the assumption is that only the choice to use the less stable material is negligent, whereas the choice to use the more stable material is not negligent. If the engineer acted negligently and ordered that Material A be used to build the floor/ceiling—which subsequently collapsed, causing a harm of \$5000—it is inconceivable that he would be held liable for only \$1000 because, had he acted nonnegligently, the potential harm would have only been \$4000.

Admittedly, this is not a case of medical malpractice but rather of professional malpractice in a different field. While there may not be the same problem of overinvestment in precaution, it seems that there is no real difference between the two types of torts, and an attempt to cope with the problem of defensive medicine does not justify such an outcome.<sup>39</sup>

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38. In truth, if a doctor has chosen to perform a cesarean delivery instead of a vaginal delivery when there was no medical reason to do so, it is possible that his choice might be deemed negligent if it is a given that a cesarean section is riskier in general. The issue becomes more complicated as to the duties of a doctor in cases in which the woman insists on cesarean delivery for her comfort only, with no medical requirement for such a procedure, but that is beyond the scope of this Article. However, Porat's example is of a doctor who has negligently chosen to perform a vaginal delivery instead of a cesarean delivery. In such a case, if under the circumstances there was a reason to perform a cesarean delivery, the increased risks of such a delivery should not be taken into account. The risks are only greater in comparison to a normal vaginal delivery without complications and not in comparison to a vaginal delivery where an existing danger makes it necessary to perform a cesarean section. In other words, if under the circumstances there was a need to deliver by cesarean section and not vaginally, it means that in this case the vaginal delivery was the risky course of action. If there is no increased risk under the circumstances then, in effect, there is nothing at all to offset.

39. Moreover, if the risks from the nonnegligent choice of action are offset against the risks from the negligent choice, then we may question why, according to the ORP, we should not also offset other existing background or environmental risks such as the risk of infection or the risks inherent to anesthesia faced by hospitalized patients. In the absence of medical malpractice, other common risks are also naturally present, including, for example, the risk of being injured in an automobile accident or a domestic accident. And we can assume that the choice of a negligent course of action might prevent these common risks or decrease their likelihood to some extent.

Background risks are always present—daily life is replete with common risks that it is not proper to quantify and take into account. However, if the ORP purports to calculate the net liability of the injurer—to only isolate that part of the harm that he caused and that would not have been caused by other risk factors—then there is no presumable logic for failing to examine background risks that do not stem from the injurer's acts or omis-

If it were possible to know in all of those cases *with certainty*, or at least by a preponderance of evidence, that the nonnegligent choice of the less risky course of action would cause harm, albeit reduced in comparison with the other course of action, then it might be said that a choice of the riskier course of action means that the injurer's negligence is only causally related to the difference between the two courses of action. However, that level of certainty is relatively uncommon in the real world, especially in the area of medical malpractice, and these cases are actually about offsetting *materialized harms*, not *risks*. The ORP deals with cases of probabilities, even if low, that harm will be caused by a nonnegligent choice. It seems that here is where the innovation of his thesis lies.

As an interim conclusion, it seems that the application of Porat's presentation of the ORP causes various practical problems. Porat warns us that, under the present situation, injurers bear a heavy burden for the damages caused by their negligence—in his words, excessive liability. From everything said up to this point, it is hard to be persuaded that the ORP is indeed the proper mechanism for determining the so-called net liability of a wrongdoer. Therefore, it is also hard to be persuaded that the current situation, with all of its shortcomings, leads to a decrease or even to the avoidance of desirable social activity as Porat contends,<sup>40</sup> which has yet to be proven empirically.<sup>41</sup>

But even if there was a normative imperative for applying the ORP, it is difficult to implement in practice, as we have seen so far, for various reasons. Reality provides numerous examples in which the application of the principle is almost impossible. There is nothing

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sions or from his negligent or nonnegligent choices. I certainly object to the notion of offsetting background risks. However, a proper analysis of the ORP might dictate such an outcome. Yet, an outcome such as this seems inherently problematic and complicates the possibility to calculate offsetting risks. It is also unjust.

Nevertheless, we must admit that in many cases background risks will be present no matter which course of action is chosen, and, therefore, perhaps they offset each other. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537 (1972). Thus, the criticism brought in this Article is valid for cases where there are increased risks that are in fact related to the negligent choice of a particular course of action and not to the choice of a different course of action; for instance, the risk that a car will overturn, which is particularly high if the negligent course of action is in fact chosen. And in any event, the ORP is very problematic even without the added problem of background risks.

40. Porat, *supra* note 1, at 267-68 (discussing this extensively in regard to the practice of medicine as part of a contractual relationship between two parties in contrast to other noncontractual relationships where risks should still be offset and where the possible outcome would be a decrease in or cessation of the activity).

41. This issue may be fundamentally problematic. Society does not want to create an incentive against involvement in activities such as medicine, but society does want negligent doctors, particularly those who are serially negligent, to be discharged from the medical system. If damages caused by those doctors would be offset again and again, the liability of negligent doctors would be reduced each time and there would be no incentive to discharge them from the system.

innovative about applying it to cases where it is *obvious* that harm would have been caused by the nonnegligent choice of the less risky approach and where the extent of harm is clear. However, there are often several different courses of action, and each one may entail the risk of a different harm—and possibly more than one harm of varying degrees (such as the side effects of a particular course of treatment, or even the possibility of disability or death)—and each harm may have a different probability of materializing. Under these circumstances, it is hard to demand such calculations—even in rough estimation—from a potential injurer, a victim who wishes to sue, or a court that must adjudicate the case.

Porat notes that the offsetting risks are not determined by a calculation of the probability that the offset harm would have been avoided in the specific case in question, but rather by a calculation of the expected harms.<sup>42</sup> However, it is difficult in practice to estimate this difference for the purpose of offsetting risks, even when searching for data regarding expected harm, particularly when there are several nonnegligent courses of action.

Porat also contends that excessive liability entails high litigation costs and increases the involvement of attorneys at the expense of patients, and the goal of the ORP is to overcome evidentiary barriers and lower such costs.<sup>43</sup> Although, in fairness, he admits that the calculations in offsetting the risks to reach a net liability are complicated.<sup>44</sup> But it seems the picture that emerges up to this point indicates that it would be necessary to invest considerably more resources in applying the principle: in the numerous calculations of the risks for each of several possible courses of action; in calculating the extent of damages for each of these courses of action; in calculating the probability of harm for each course of action; and, finally, in offsetting the risks themselves. The principle's application would actually create new evidentiary barriers since these added calculations would require the testimony of experts in the fields of both medicine and statistics. This would entail new expenditures added to the litigation costs that already exist for proving the excessive liability about which Porat complains.

Some may argue that, since contingent fees are well accepted in many countries around the world, lower awards of compensation will also mean lower fees. However, even if this is basically true, it may be assumed that if the system were to adopt the offsetting risks model, lawyers would increase the percentage of their contingent fee so that it would be just as profitable for them to work on these types of

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42. Porat, *Excessive Liability*, *supra* note 1, at 26 n.33.

43. Porat, *supra* note 1, at 264, 275.

44. *Id.* at 272.

cases in the future as it is for them today, especially when the issue entails handling more testimony, expert opinions, and so many calculations. Moreover, the work of the attorneys in suing an additional party other than the injurer—the social or private insurer—make the activity particularly lucrative because it would require greater effort on their part. More intense activities, like increased letters, more litigation, preparation of cases against multiple parties, additional expert witnesses, etc., mean more working hours and greater expenses, which would be reflected in higher fees.

#### IV. THE PROBLEMATIC COMPARISON BETWEEN THE OFFSETTING RISKS PRINCIPLE AND PROBABILISTIC CAUSATION

Porat argues that the ORP bears a superficial resemblance to what he refers to as a probabilistic recovery principle (PRP). PRP is the notion of probabilistic causation—which includes lost chance and increased risk doctrines.<sup>45</sup> The ORP aspires to protect against overdeterrance, i.e. from a situation where the wrongdoer pays more than the harm he created, whereas the PRP aspires to protect against underdeterrance, where a wrongdoer pays less than the harm that he created.

Porat attempts to draw inferences from this comparison in support of the ORP since, according to both principles, the injurer is held liable for the exact same magnitude of harm that he caused (in this case, the risks he created)—no more (ORP), and also no less (PRP). This is designed to provide the injurer with effective incentives for taking precautionary measures and minimizing social costs. The PRP, which is calculated *ex post*, aspires to overcome the uncertainty of a specific case, whereas the ORP, examining expected harms, aspires to grant credit to the injurer for the positive externalities of his activity.<sup>46</sup>

A comparison between the principles may be done by calculating the attributable fraction, i.e., the portion of risk increased or chance lost by a wrongdoer's act or omission. In both cases the calculations are complicated. There could be a serious problem in calculating the attributable fraction of the defendant's act, in conjunction with the necessary calculations for the ORP, in an attempt to determine the effect of the defendant's act on the plaintiff's increased risk or lost chance. Apart from these calculation problems, one should be very careful when making a comparison of this nature. Indeed, Porat is consistent, and he attempts to convince us that the injurer should take responsibility only for the net risks that he caused.

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45. ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 116-29, 195-201 (2001).

46. Porat, *supra* note 1, at 260-62.

This comparison also raises a number of problems. The PRP enters the picture when we are talking about an incomplete tort where the factual causal relationship between the wrongful act and the harm has not been adequately proven. Therefore one may not accept PRP, and indeed there are countries in which PRP is not applied in case law, since it is considered as an incomplete tort.

All of this is in contrast to the cases presented by Porat as a basis for the ORP. In the basic example, the negligent choice, which entails a risk of \$500, constitutes a tort. Once the harm of \$5000 has been proven—presumably by a preponderance of the evidence—then all elements of the tort are present, including the factual causal relationship between the tortious act and the harm. Similarly, the non-negligent choice in his example, which entails a risk of \$400, is not a tort at all, even if were to result in harm of any magnitude. One should therefore be wary of the comparison between a principle that is applied in cases in which the tort is incomplete, but nevertheless partial compensation is awarded, and Porat's principle which is to be applied in cases in which the tort is complete and the application of the principle leads to reduced compensation.

Moreover, the PRP, as it applies today, assists injured parties, whereas the ORP assists injurers. On the surface, this would indicate the neutrality of the economic approach to tort law, which serves as a basis for both these doctrines to be discussed—this approach does not consider the question of whether the outcome is beneficial to the injurers or the injured parties, focusing instead on the issue of efficiency alone. Of course there is not merely a technical difference between the issues. Indeed, it is certainly proper, in light of the goals of tort law, to examine the attempt to pay partial compensation based on the PRP according to lost chance or increased risk doctrines. This state is preferable for the injured party and from social and deterrence perspectives in comparison with a state of no compensation at all. But in applying these doctrines, an inverse outcome—of underdeterrence—might be justified and accepted in principle, even to the point where the injurer would pay nothing, since this is an incomplete tort lacking factual causation. However, the underdeterrence resulting from the ORP's partial compensation, or lack thereof, when all elements of the tort have been proven by a preponderance of the evidence, is completely unacceptable.

Porat also notes that the PRP deals with the laws of evidence, whereas the ORP deals with substance.<sup>47</sup> Therefore, the innovation of the ORP is greater, and although there is nothing wrong with innovation per se, there are serious problems underlying the principle

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47. *Id.* at 270 n.64.

and its application, as we have shown above, and it is also inconsistent with most of the goals of tort law, as we will see below.

Nevertheless, even if there is some theoretical resemblance between the two principles, it is unclear that the proper outcome should actually be recognition of the ORP. To illustrate this, I will cite from a judgment in an appeal to the Israeli Supreme Court in a case of a lost chance that dealt with a hospital's attempt to reduce the award of compensation, awarded in first instance resulting from its negligence, which had been proven by a preponderance of the evidence. The hospital argued, in a manner similar to the ORP, that probabilistic causation must be symmetrical, leading to an outcome whereby, if there is a particular risk that an operation performed nonnegligently would also cause harm, compensation should be reduced by the same degree of risk, even when it has been proven that the harm was caused by a negligent act.

The hospital also argued that if the plaintiff could prove that it was negligent, but only by a probability of 70%, then the compensation awarded should only be 70% of the full harm inflicted, i.e. 30% of the compensation that was awarded in the first instance should be deducted. This outcome diverges from that of prevailing law, which awards full compensation when the preponderance of evidence burden of proof is met, i.e., when negligence has been proven by a probability of over 50%. The court was adamant in its response, and its own words speak for themselves to our issue:

The world of medicine is given to doubt and uncertainty. Every medical treatment might carry a certain degree of risk, even if administered properly. However, it is not accepted nor is it proper, when an operation has failed due to the negligence of the medical staff, to deduct from the amount of compensation a sum purporting to reflect said risk, even if this is an abstract or negligible risk.<sup>48</sup>

#### V. THE INCOMPATIBILITY OF THE OFFSETTING RISKS PRINCIPLE WITH MOST OF THE GOALS OF TORT LAW

Even if it were possible in some way to ignore all of the aforesaid obstacles presented by the ORP, including the serious, inherent problems in its application, there would still remain the grave problem of the incompatibility of the ORP and of the proposal to supplement the compensation through other mechanisms outside the scope of tort law, such as through social insurance and private insurance, with most of the goals of tort law.

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48. CA 7469/03 Shaarei Tzedek Med. Ctr. v. Cohen, Takdin Elyon [2005] IsrSC 2005(2) 406 (translated by author).

Within today's legal world, there is no consensus regarding the goals of tort law, or whether there is one or more controlling purpose in light of which cases should be analyzed.<sup>49</sup> Some would argue that there is a mixture of goals underlying tort law but that not all of them can be applied in any given instance.<sup>50</sup> Tort law developed primarily under common law, which led to the development of ad hoc rulings from one case to another, and in ways that differed from one state to another.<sup>51</sup> Today there is no overall agreement on what the goals are or on the scope of each goal. Various scholars present lists of these goals in slightly different ways. The following four principle goals have been presented: compensation and *restitutio in integrum*, corrective justice, distributive justice, and, in part, deterrence.<sup>52</sup>

The theoretical analysis of tort law over recent decades is marked by scholars who hold monistic approaches—that is, they see one or another of the goals of tort law as being dominant, almost to the exclusion of the other goals. First, we find those who hold the deontological-ethical approach, supporting corrective justice. This approach examines the relationship between the injurer and injured party and the need to redress the injustice done by the former to the latter.<sup>53</sup> On the other hand, there are those who hold to the consequential-teleological approach—for our purposes, the economic approach—whose primary interest is maximization of aggregate welfare and not necessarily the relationship between the parties. These scholars support optimal deterrence which looks at efficiency through consideration of the outcome of the tortious act and attempts to minimize the expenses of the incident.<sup>54</sup> In addition to these two approaches, there is another monistic approach, that of distributive justice, which em-

49. See generally KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 14 (3d ed. 2007); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, 1-7 (5th ed. 1984); W.V.H. ROGERS, WINFIELD & JOLOWICZ ON TORT 1 (London, 16th ed. 2002); Glanville L. Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137 (1951) reprinted in MARK LUNNEY & KEN OLIPHANT, *TORT LAW: TEXT & MATERIALS* 18 (3d ed., Oxford Univ. Press 2008).

50. ABRAHAM, *supra* note 49; WINFIELD & JOLOWICZ, *supra* note 49; Williams, *supra* note 49.

51. ABRAHAM, *supra* note 49; Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 390-98 (2005).

52. See PROSSER AND KEETON, *supra* note 49, at 20-26 (providing an extensive discussion of the goals of tort law); see also Williams, *supra* note 49.

53. The principle proponents of this approach in the past generation were George Fletcher, Richard Epstein, and, later, Ernest Weinrib and Jules Coleman. References will be provided below, where the goal of corrective justice is analyzed.

54. The principle proponents of this approach were Guido Calabresi and Richard Posner. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 23, 293-300 (1970); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Richard A. Posner, *The Cost of Accidents—A Legal and Economic Analysis*, 37 U. CHI. L. REV. 636 (1970) (Book Review); Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975).



phasizes the need to empower, through tort law, the weaker sectors in society; here feminism is particularly relevant.<sup>55</sup>

In contrast to these approaches, a number of pluralistic approaches have developed which attempt to adjust two or more of the goals of tort law and find a balance between them. These approaches are different both in terms of the dominance that they give to a certain goal or set of goals from the outset and in the way in which they strike a balance between the different goals.<sup>56</sup> These approaches do not limit themselves to simply analyzing one single goal of tort law, as the monistic approaches do.

This Article does not seek to present the monistic and pluralistic approaches in detail nor decide between them. The aim here is to examine the ORP against the familiar goals of tort law. The analysis below will show that the ORP impinges on each of these familiar goals. It will also raise the question of whether the ORP is absolutely consistent with the goal of optimal deterrence, which serves as the monistic basis for construction of the principle, although Porat does not ignore the other goals.<sup>57</sup>

Essentially, the analysis below will indicate that the ORP is problematic with respect to each of the monistic approaches, particularly those of corrective justice and distributive justice, but also, to a certain extent, that of optimal deterrence. The principle is also problematic according to the pluralistic approaches, whatever the balance between the individual goals may be, since the principle is problematic in terms of each goal from a monistic perspective.

The problems in adapting the principle to the various goals of tort law are varied. They do not stem solely from the idea that the compensation received under the ORP is partial, even though this is a very important point in analyzing the ORP vis-à-vis the goals of tort law. There are additional problems in the analysis of the various goals. Even though Porat claims that compensation under ORP is appropriate and in line with the goal of optimal deterrence (although not in line with the other goals, as he in all fairness acknowledges),<sup>58</sup> the ORP may be attacked on the basis of this goal as well.

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55. See, e.g., Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, in FOUNDATION OF TORT LAW 235-44 (Saul Levmore ed., 1994); Martha Chamallas, *Importing Feminist Theories to Change Tort Law*, 11 WIS. WOMEN'S L. J. 389 (1997).

56. See, e.g., IZHAK ENGLAND, *THE PHILOSOPHY OF TORT LAW* (1993); Mark Geistfeld, *Economics, Moral Philosophy, and the Positive Analysis of Tort Law*, PHILOSOPHY AND THE LAW OF TORTS 250 (Gerald J. Postema ed., 2001); Fleming James Jr., *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315 (1959); Robinette, *supra* note 51; Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997); Williams, *supra* note 49.

57. See Porat, *supra* note 1, at 276 (discussing the goals of compensation and corrective justice).

58. See *id.* at 247.

In the following discussion, I will try to show that the ORP is incompatible with most of the goals of tort law and also that the solutions offered by Porat regarding supplemental compensation through other mechanisms outside of the boundaries of tort law could also be problematic in this context.

The ORP is most definitely inconsistent with the goals of compensation and *restitutio in integrum*, whereby a person who suffers a tortious harm should be fully compensated<sup>59</sup> and, insofar as possible, restored to the position that they would have been in had the tortious act not been committed, whereas the compensation awarded by the application of the ORP is only partial.<sup>60</sup> Nor is it compatible with the goal of corrective justice, which is to rectify a past injustice while taking into account the identity of the injurer and the victim and to ignore all factors extraneous to the event.<sup>61</sup> This incompatibility derives from the basic fact that the compensation received from the injurer is only partial.

In Porat's opinion, the ORP might be consistent with principles of corrective justice since the payment by the wrongdoer is actually for the net harm that he has caused (i.e. the net risks that he created and where materialized) and no more.<sup>62</sup> However, as stated in earlier Parts, it is hard to agree with this point of view. At any rate, even Porat admits that the partial compensation of the ORP will certainly be viewed as *inconsistent* with the goals of compensation and corrective justice, since, in effect, application of the principle means that the victim will be undercompensated, which does not restore him to the position he would be in had the doctor acted reasonably instead of negligently.<sup>63</sup>

Were it possible to reduce a known extent of harm that would have definitely, or at least on the preponderance of the evidence, been caused by the choice of a nonnegligent course of action, as in the

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59. ABRAHAM, *supra* note 49, at 14; Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 234, 256 (1908), *reprinted in* FRANCIS H. BOHLEN, *STUDIES IN THE LAW OF TORTS* 530 (1926).

60. PROSSER AND KEETON, ET. AL., *supra* note 49, at 20.

61. See, e.g., ENGLARD, *supra* note 56, at 11-20; ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 5, 56-83 (1995); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Stephen Perry, *The Moral Foundation of Tort Law*, 77 IOWA L. REV. 449 (1992); Christopher H. Schroeder, *Corrective Justice & Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002); Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES IN LAW 107 (2001); Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277 (1995); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989); Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625 (1992).

62. Porat, *supra* note 1, at 247.

63. *Id.* at 247, 269; Cooter & Porat, *supra* note 1, at 25.

previous example where both of a patient's eyes were removed, there would be no problem of incompatibility with corrective justice. In such a case, it is clear that the factual causal relationship exists only in regard to the difference between the two courses of action, even without a need for the ORP. However, Porat's thesis goes beyond this, and even he admits that it is problematic from the perspective of the goals of compensation and corrective justice.

It seems that Porat is uneasy about a situation where part of the damages falls on the victim's shoulders. Therefore, he refers the victim to mechanisms outside the framework of tort law to supplement the difference, which could be substantial—such as in the example that he gives (80%). The two mechanisms proposed by Porat for the supplement of the compensation—social and private insurance—do not offer an adequate solution. But before analyzing these proposals against the goals of compensation and corrective justice, I wish to ask again: if the harm from the tort is only \$1000, and the remainder does not derive from a tort, and presumably it would have been realized into a harm anyway by the choice of a nonnegligent course of action, then why compensate the victim for \$4000 through a separate mechanism? The only possible conclusion is that the entire \$5000 represents a tortious harm that demands the payment of full compensation by the wrongdoer.

Although the proposal to use a social insurance scheme to supplement the difference has some logic,<sup>64</sup> it has been rejected in the past for various reasons.<sup>65</sup> Its application for the purpose of supplemental compensation after risks have been offset is even more problematic, both from a substantive as well as a procedural perspective. If the victim must be fully compensated for his injury, in accordance with the goal of compensation, and especially if he should receive it directly from the injurer, in accordance with the goal of corrective justice, then there is no logic in supplementing the compensation by means of private or social insurance.

The entire logic for establishing an insurance fund of this sort is to prevent medical malpractice cases from being submitted to the courts in the way they are submitted today and to offer the victim the option to file an insurance claim *instead* of directly suing the doctor. Even from a procedural perspective this would be cumbersome and would raise costs. It would also place an unreasonable and unfair burden on

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64. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* 169 (1989); Porat, *supra* note 1, at 275.

65. For a discussion of this proposal and its rejection in Israel, see MINISTRY OF HEALTH, *REPORT OF THE COMMITTEE INVESTIGATING LIABILITY IN MEDICAL MALPRACTICE CASES* (1999), headed by former Deputy President of the Tel Aviv District Court, Judge Gabriel Kling, § 97, at 101-02. For the dissenting opinion, see *id.* § 117, at 158-59.

the shoulders of the patient who has been injured to file an initial application for insurance and a claim submission after the injury, and the financing of the fund would fall on the shoulders of all potential patients.

The proposal to set up a private insurance mechanism to supplement the difference is also problematic as well as unjustified. Firstly, just as with social insurance, the victim would be forced to conduct separate proceedings against two parties, each for its own share. Secondly, the burden of applying for the insurance and paying for it would still fall on the shoulders of the potential injured party. Thirdly, Porat notes, in fairness, that indigent patients may be disinclined to purchase private insurance (even if this is mandated by statute) because they cannot afford it. Those without private insurance could potentially pay a heavy price under Porat's ORP if left uncompensated for their injuries.<sup>66</sup>

In any event, whether the arrangement involves social insurance or private insurance, the proceedings will be complicated. The injured party will be forced to sue two separate defendants for each one's individual share, and in both instances the burden of applying and paying for insurance will fall on the potential injured party.<sup>67</sup>

In addition to the fact that the injurer does not pay full compensation, another problem with the ORP is uniquely related to corrective justice and not to the goal of compensation. According to the goal of compensation, there is no meaning to the identity of the compensator, as long as the injured party gets full compensation. According to principles of corrective justice, however, the wrongdoer, and only the wrongdoer, must fully pay for the harm that he has caused. The ORP dictates that the injurer pays only part of the damages, whereas other parties supplement the remainder. It is the injured party who pays the premiums and purchases the risk, rather than the injurer, and in many instances, such an injured party will not actually be insured and thus will not receive full compensation. In any event, if the injured party cannot afford to purchase insurance, he would be left with partial compensation only—a result that is contrary to both goals.

In addition to all this, Porat assumes that the patient's *ab initio* interest is to be awarded partial compensation as a result of offsetting risks in order to improve the doctor's incentive to provide better health care. In his opinion, imposing a duty on the doctor to pay full

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66. Porat, *supra* note 1, at 270 n.65.

67. It is clear that no specific criticism is being raised here regarding the possible shift of the whole mechanism to social insurance or private insurance. These issues will need to be clarified separately. The point being raised here is simply a critique of the problem inherent in the existence of two different mechanisms and the complications as a result of proceedings in two separate claims.

compensation actually does the patient injustice.<sup>68</sup> Porat explains that for patients the option of offsetting risks is a good option because the alternative means the continued practice of defensive medicine and an overinvestment in precautions, which is detrimental to the standard of health care they receive.

If this assumption were well-founded, then perhaps, on the balance between the various considerations, improving healthcare overrides the infringement of the goals of compensation and corrective justice. However, this is not so. It is difficult to say that the present situation, in which risks are not offset, is itself the cause of defensive medicine and overinvestment in precautions. This kind of argument requires a broader foundation.

Even if Porat's solution would necessarily decrease the practice of defensive medicine and overinvestment in precautions, his speculation regarding the interests of patients must be established and proven empirically. To the same extent, other assumptions may be made, including that the typical risk-averse patient would actually prefer to know that if he is caused harm as a result of medical malpractice he can sue and receive compensation for *all* of his damages, even if this requires that he pay a bit more from the start as a sort of insurance.<sup>69</sup> He knows that even if there is no phenomenon of defensive medicine, and medical services would be perfect, he may be harmed as a result of the doctor's acts. Given this, he is not interested in suing the injurer and receiving only partial compensation despite the fact that he has proven all of the elements of his claim, in order to create a general incentive for doctors to provide better care, even if it would have some positive effect on himself and on other patients in the future. A risk-averse patient would, therefore, want to ensure full compensation when he is harmed and not a partial compensation in return for a general expectation of medical services that might affect him in the future.

However, even if we assume that the victim is willing to obtain partial compensation in exchange for better medical services, patients would certainly not want to have to conduct two separate proceedings against two different parties—the injurer and the social or

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68. Porat, *supra* note 1, at 269-70 (arguing that, in fact, this is less suitable in cases such as when there are benefits to third parties or to society at large). Porat agrees that the victim obviously has an ex ante interest in receiving the greatest amount of compensation possible, especially when there is no contractual relationship between the injurer and the victim. *Id.* Problematic cases, where risks to third parties or society at large are reduced from the compensation of a concrete victim, will be discussed below.

69. Porat discusses this possibility but views it as part of the problem with the current reality in which risks are not offset. *Id.* at 269. Porat agrees that this is how a risk-averse patient would behave, but he views this as an anomaly. *Id.* at 269. In my opinion, it is hard to "fight" this reality; one should definitely not create an assumption that is contrary to this reality, even if the writer thinks it is an anomaly.

private insurance carrier—but would prefer to proceed against just one party: the party that inflicted the harm.

Indeed, Porat tries to handle the issue of what is desirable in the eyes of the typical patient. He is not satisfied with merely a general economic statement that the ORP is desirable according to optimal deterrence. Nevertheless, to support the assumption that people would behave in a certain manner, and not otherwise, as a basis for a proposal to effect a fundamental change in tort law, factors influencing human behavior must be examined very carefully.<sup>70</sup> It is not at all certain that patients would behave as Porat believes they would, or even that they could be persuaded to act in this way. It is more reasonable to assume that they would continue to behave in the traditional, risk-averse manner, interested first in knowing that they would be fully compensated if they need to sue. They would not want to have to go to the trouble of seeking supplemental compensation from another party in addition to the injurer, a burden that is inconsistent particularly with corrective justice.

Another problem with the ORP in regard to corrective justice is related to its central rationale, which is to deal with the problem of defensive medicine and the subsequent overinvestment in precautions. This is a systemic and social reason, designed for the improvement of the system in general. This instrumental argument has nothing to do with the relationship between the two specific parties in a concrete instance of wrongdoing as dictated by corrective justice. If we do not adopt such extreme approaches as those which only focus on the plaintiff and the defendant—and allow certain considerations not directly related to the relationship between the two parties to be taken into account—we still need to carefully examine whether the problem of defensive medicine and overinvestment in precautions would be resolved by the proposed solution: a reduction in the compensation received by the victim who is then sent to seek the difference through mechanisms such as social or private insurance.

Porat notes that sometimes a negligent act committed against a specific person not only harms that person but also saves him from other risks. Under prevailing law, the wrongdoer receives no credit for the fact that he reduced the risk that would have been created

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70. See R. H. COASE, *THE FIRM, THE MARKET AND THE LAW* 1-5 (1988) (criticizing economists who have not tried to examine the causes that affect human behavior); see also Yaacov Schul & Ruth Mayo, *Searching for Certainty in an Uncertain World: The Difficulty of Giving Up the Experiential for the Rational Mode of Thinking*, 16 J. BEHAV. DECISION MAKING 93, 93-106 (2003) (examining the questions of whether behavior can be directed, when people are more calculating, and when they are more experiential); Eldar Shafir & Amos Tversky, *Thinking Through Uncertainty: Nonconsequential Reasoning and Choice*, 24:4 COGNITIVE PSYCHOL. 449-74 (1992) (examining the rationales for human behavior in a manner different from the accepted view of economists, and attempting to advance a theory of expected utility). I thank Yuval Feldman for bringing this point to my attention.

had he chosen the nonnegligent course of action; the positive external effect of his behavior is not taken into account.<sup>71</sup>

However, from the perspective of corrective justice, the problem with offsetting risks related to the victim is only the tip of the iceberg. Porat also discusses the application of the ORP in two other categories extraneous to the specific victim—cases where the negligent choice of a course of action has led to a decrease in risks to a third party or to a decrease in risks to society as a whole.<sup>72</sup> Indeed, Porat does not propose to apply this in practice, but he points out that implementation of the ORP in such cases is just a consequence of its underlying rationale of using optimal deterrence to determine the net liability of the injurer. A fear exists that if the legislature or the courts were to adopt the principle in its entirety, they would also offset risks to a third party or a social interest, despite Porat's objections. Again, this is radically inconsistent with the goal of corrective justice.

The third-party interest presented by Porat includes cases where the choice of a negligent course of action has not only endangered or actually harmed the victim himself, but has also reduced risks to a third party. In such cases, Porat argues application of the ORP would be consistent with the principle of optimal deterrence.<sup>73</sup> He illustrates this with several examples. One example is that of a doctor in an emergency room who refrains from treating one patient so he can treat another patient, while the first patient sustains harm. Porat argues that the doctor should be given proper credit for reducing the risk to the other patient when compensation is awarded.<sup>74</sup> However, this is a clear case of circumstance and there is no reason to examine the risks to each patient and offset them; instead, the focus should be on the negligence towards the patient who was not treated, and the court should be trusted to reach an outcome of reduced compensation, if appropriate, through common sense and nothing more.

This is possible since, for medical malpractice harms and other negligence damages, there are no fixed tables of compensation rates

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71. Porat, *supra* note 1, at 247-48, 252-53 (illustrating this not only with the first, basic example of medical malpractice—where the choice of the negligent course of action increases the risk to one of a patient's arms, and this risk is realized but reduces the risk to the other arm, thus also reducing risks to the same patient—but with other examples as well).

72. *Id.* at 254-60. Porat sees a theoretical difference between the category of offsetting risks related solely to a specific victim and the categories of offsetting risks to third parties or a social interest. In his opinion, it is more difficult in practice to apply the ORP to these last two categories since the goals of compensation and corrective justice are not realized. However, he does believe that for these two categories the goal of optimal deterrence is achieved because the injurer is only held liable for the net harm that he causes. *See id.* at 256-60, 276.

73. *Id.* at 254-58.

74. *Id.* at 256.

and the courts may award compensation as they see fit. For nonmonetary damages, one would trust that the courts would not award large sums of compensation in these types of cases. Furthermore, in certain circumstances the court should determine that there is no negligence at all without the need for a legislated ORP.<sup>75</sup>

Another example is that of an ambulance driver who, while rushing a wounded person to the hospital, negligently hits a pedestrian as a result of his speeding. According to Porat, the pedestrian is harmed by the driver's negligence, but the risks to the wounded passenger are reduced because, if the driver had gone slower, the passenger's condition might have worsened.<sup>76</sup> Here too it may be said that in awarding compensation the court should be trusted to make the proper balance, without the need to legislate the ORP, since as stated previously, courts do not make their awards based on predetermined compensation tables in cases of negligence.

But even more than this, in such a case it may be argued that the negligent driver, despite his good intentions, which are *not* usually taken into consideration by the law of negligence, did not just increase the risk of harm to the pedestrian by speeding and decrease the obvious risk to the wounded passenger of driving slower. He also increased other risks to the wounded passenger and all other passengers who might have been further harmed as a direct result of the accident (a risk that was also increased for all drivers and pedestrians in the vicinity) or from a delay in reaching the hospital caused by the accident. In a case like this, principles of corrective justice might focus on the increased risk to the pedestrian. If risks to third parties should also be taken into account, then there is no logic in just considering the risks *decreased* by rushing the wounded passenger to the hospital while ignoring the *increased* risks that this behavior creates to third parties, i.e., the wounded passenger himself and all other drivers and pedestrians in the vicinity.

For example, if the risk for a wounded person were increased and decreased to the same extent, and it is agreed that increasing the risks to third parties should be considered and not only decreasing the risks, then there would be nothing to offset in the pedestrian's lawsuit. This specific example also illustrates the possible complications and ramifications of applying the ORP, and not only its inappropriateness for corrective justice. In this example, there will be the need to calculate not only the risks to the injured party himself and offset them, but also the risks decreased to third parties and to offset

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75. It may be assumed that this would be the judgment in the example of the policeman, given by Porat. *See id.* at 259.

76. *Id.* at 254; *see id.* at 255-56 (providing examples of additional cases).



them too, and then to offset what was left (if any) of the risks to a third party from the risks to the injured party.<sup>77</sup>

One might also assume that, in the category of offsetting third-party risks, the ORP would be applied in cases involving lawyers and their clients. A possible example is the case of an attorney who represents both the seller and the buyer in a real estate transaction, something that is accepted in various countries. In such a case, the risk of harm that is realized for one client could be offset against the risk of harm that might have been realized for the other client. In principle, the lawyer has an equal responsibility towards both parties; however, in effect, he is performing a single transaction that has the potential of benefiting one party at the expense of the other. In a situation like this, an attorney handling such a transaction would know that if he is held liable for malpractice, he could always offset the risks if the loss for one party, caused by his negligence, also entails a profit for the other party. Obviously, such an application of the ORP leads to an improper and unethical outcome.

Certainly, such an unethical and even immoral outcome would be inconsistent with corrective justice, apart from the ORP arrangement's overall unsuitability for this goal. This is a case in which it would be possible, as a kind of insurance, to control the possible profit from any situation through offsetting risks, and thus to take less care, since harm to one party means profit to the other party. Such an outcome would serve the interests of the injurer in almost all cases; it involves an unethical promise of offsetting, at the expense of the injured party. Undoubtedly, this is an instance of exploitation of the ORP. In many instances such exploitation may not be determined *ex post*; the lawyer may argue that, even if he was negligent, he was not so intentionally and did not consider these outcomes *ex ante*; as a result, he will now demand that the risks be offset.

If we adopt the common law distinction between intentional torts and unintentional negligent acts,<sup>78</sup> this approach would involve a further subdivision, separate from the distinction between negligence through the choice of a riskier course of action and other instances of negligence, to ensure a moral outcome. Apart from the application of the principle specifically to cases of medical malpractice, the principle would be applied only in cases of unintentional torts. All this is

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77. This outcome joins the critiques that were noted in chapter II as to the problematic aspect of calculating the risks.

78. In common law in general, there is a built-in division between negligent torts, which are considered unintentional, and torts as a result of reckless behavior, which are considered intentional. See *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM* § 1, 2 (Proposed Final Draft No. 1, 2005); OLIVER WENDELL HOLMES, *THE COMMON LAW* 85-117 (1881); Kenneth J. Vandeveld, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 *HOFSTRA L. REV.* 447, 447 (1990).

in addition to Porat's proposal to distinguish and not apply the ORP to cases in which the injurer artificially inflates the risks to be offset, thus deliberately lessening the difference between the forms of treatment, thereby lessening his liability as far as possible.

Apart from the problems with separating and calculating such a distinction, it is disturbing to think that, in cases in which it is *not* possible to make such a distinction, injurers would succeed in their strategy and reduce the compensation to the injured party even further. Here, even Porat would be forced to admit that, according to his approach, the compensation would be insufficient and clearly contrary to the goals of compensation and corrective justice.

In any event, there is another division here, even though, from the perspective of corrective justice, it may be appropriate to oppose the offsetting of risks in such instances—both that of the lawyer and that of the doctor who artificially inflate the risks to be offset. This is a kind of “catch-22”: if the ORP is not applied in the case of intentional behavior, there would be a further division between cases in which it is applied and those in which it is not applied. The laws of negligence would again be split in two, this time from another direction. If the principle is applied in cases of intentional behavior, it would involve a serious ethical infringement.

Even proponents of the economic approach who support optimal deterrence would agree that an upper moral boundary ought to be set that would not permit optimal outcomes that are highly immoral. Prominent scholars who are familiar with the economic analysis of law, among them one of its founding proponents—Professor Guido Calabresi—view considerations of justice and morality as something of a constraint when implementing an economic approach. Calabresi indeed notes that optimal deterrence is supported by considerations of justice,<sup>79</sup> and it seems that Professor Gary Schwartz follows the same line of thinking.<sup>80</sup> True, for Calabresi, only optimal deterrence is a legitimate goal, while justice constitutes a supreme moral boundary as a constraint in the sense that if a particularly efficient outcome is immoral in a given case, then it should not be sought even if it is extremely efficient.<sup>81</sup>

This is even more true in regard to the societal interest cases presented by Porat. Porat explains that, when analyzing the goal of optimal deterrence, decreased risks to the aggregate social interest should be offset against increased risks that are realized for a specific

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79. See CALABRESI, *supra* note 54, at 293-300; see also Guido Calabresi, *Toward A Unified Theory of Torts*, 1:3 J. TORT L.1, 1-2 (2007).

80. Schwartz, *supra* note 56, at 1824.

81. CALABRESI, *supra* note 54, at 25-26, 31.

victim of a negligent choice.<sup>82</sup> He illustrates this with the example of a tour guide who has a choice between two paths: one where hikers are likely to be endangered and one where the hikers are likely to cause damage to the landscape. The assumption is that the guide also has a responsibility to protect the environment, and not just to protect the safety of the hikers. The guide chooses the first path and one of the hikers falls from a cliff.<sup>83</sup>

Applying the ORP to this case is extremely problematic. The choice of the path that is dangerous to the hikers exposes them to a risk to which they would not have been exposed on the other path. There is no reason to take into account the risk to the environment that was avoided by not choosing the safer path. The only risk that should be examined is the risk to the victims, in accordance with the goals of compensation and corrective justice. Preservation of life and limb ought to be viewed by the law as a supreme value, overriding environmental considerations.

The harm here is even greater than in the third-party interest cases. In the third-party interest cases, although they are still inconsistent with corrective justice because they involve a relationship external to the two parties, we are dealing with two instances of bodily harm occasioned to two different people, but in the societal interest cases we are dealing not only with a principle external to the relationship between the injurer and the injured party, but also bodily harm versus harm to flowers. Here too, Porat explains the outcome in terms of efficiency and optimal deterrence that sometimes, as he admits, are incompatible with corrective justice.<sup>84</sup> But such an immoral outcome, where there is no proportionality in the offsetting comparison, must, even if optimal, be opposed by the proponents of economic analysis.

Offsetting of risks that apparently were saved to the injured party from the wrongdoer not choosing the course of action that entailed more risks for him (with all its problems), in addition to offsetting the risks that were saved for third parties and society in general (with its more severe problems), constitutes a real infringement of the goals of compensation and corrective justice. If that is the case, a proponent of an approach espousing the dominance of corrective justice—even if one does not take it literally—would not only find it very hard to accept an offsetting risks argument related to the victim himself, but also, and especially, one based on a concern for third parties or the aggregate social welfare at the expense of a specific victim.

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82. *Porat, supra* note 1, at 258-60.

83. *Id.* at 258.

84. *Id.* at 258, 268.

Even Porat does not necessarily recommend that risks to third parties and society at large be offset, but rather discusses this matter from the perspective of optimal deterrence and nothing more.<sup>85</sup> But there is still the concern that if the ORP is ultimately adopted (and not limited on this point), it would possibly encourage, even if not deliberately, inappropriate and immoral actions. This only adds to the aforesaid inherent technical and substantial problems with the normal application of the ORP discussed above (which examines the risks for the injured party himself from both courses of action), in relation to the goals of compensation and corrective justice.

Finally, let me examine whether the ORP is consistent with the unique approach of Professor George Fletcher in understanding corrective justice. Although not adopted extensively in judicial rulings, this approach has often been mentioned in the literature dealing with corrective justice in particular, and tort law in general, over the decades since it was first presented. Fletcher offered a theory of reciprocal risks as an appropriate understanding of corrective justice.<sup>86</sup> Fletcher argues that the use of tort law to achieve social goals creates an inappropriate mix between corrective justice and distributive justice. He is opposed to instrumental conceptions of tort law, particularly that of economic efficiency, and he sees the goal of this system as only the moral criterion of protecting the individual who has been harmed. He perceives corrective justice as derived from an examination of the risks that each party may cause to the other.

According to Fletcher's approach, any liability regime has to examine the reciprocal risks that the parties create. If the risks are reciprocal or relatively equal in magnitude, for example, two aircrafts that collide with each other, then the defendant would not be liable even if he caused the damage. If, however, the tortfeasor endangers the plaintiff in a one-sided manner, for example, a pilot who endangers people on the ground, without a reciprocal risk equal or greater in magnitude than the initial risk, then liability for damage caused to the plaintiff would be imposed on the pilot.<sup>87</sup> A nonreciprocal risk exists when, from the outset, the actions of the tortfeasor endangered the plaintiff more than the alternative choice of action or when the

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85. In spite of this, Porat mentions that offsetting risks in those cases also is an inevitable outcome in any case to ensure compensation that reflects the actual harm caused to the victim, while focusing on optimal deterrence and the net harm caused by the injurer's actions. *See id.* at 256-60; *but see id.* at 276 ("[I]f, however, one accepts that principles of corrective justice and the goal of compensation should play a determinative role in tort law . . . then cases in which the offsetting risks relate to third parties or society at large could require different treatment. In such cases, application of the ORP is far more problematic.").

86. Fletcher, *supra* note 39, at 537-64.

87. *Id.* at 541-48.

risks are initially reciprocal but, as a result of the defendant's negligence, they became nonreciprocal.<sup>88</sup>

The theory of reciprocal and nonreciprocal risks has to be applied separately in each case. In regard to medical malpractice, it is usually the doctor who endangers the patient, without any reciprocal risks, and certainly not risks of equal magnitude.<sup>89</sup> Thus, the application of Fletcher's approach does not fall outside the basic understanding of corrective justice as seen by the more traditional approaches—that when a nonreciprocal risk materializes to the patient, the doctor must pay full compensation to the patient. That being the case, it appears that the ORP is also inconsistent with Fletcher's understanding of corrective justice. This would be especially true where the risks being offset are to a third party or to society in general. Fletcher opposes looking beyond the two parties and the risks they create toward one another.

Fletcher's approach may indeed be closer to the understanding of distributive justice. One who endangers another with a nonreciprocal risk holds power and control. This applies to the division of power and wealth within society, and thus goes beyond the boundaries of the view of the two parties alone, perhaps contrary to Fletcher's original intentions and declarations, and is the underlying basis for the goal of distributive justice, which I will now discuss, and with which the ORP is also inconsistent. In any event, whether Fletcher's approach is that of corrective justice or is closer to distributive justice, the ORP is not consistent with it.

To promote social goals, distributive justice links all potential partners in the allocation of wealth and other societal tasks, resources, and benefits on the basis of the criterion of relativity.<sup>90</sup> This Article has already criticized the two solutions offered by Porat for supplementing the offset compensation, based on their inherent inadequacy and their incompatibility with the goal of corrective justice. But they are also very problematic given principles of distributive justice, and the need to prove the separate share of each one. According to both solutions, someone other than the injurer, namely a social or private insurer, would supplement the compensation for the difference created by the offset risks.

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88. *Id.* at 547-48.

89. At times there is a risk that the doctor may be infected by the patient or that the patient or his family may attack the doctor. Such risks might be fixed in respect to each form of treatment chosen by the doctor, or they may vary to a certain extent in line with the form of treatment. But these risks are generally smaller than those arising from the doctor's treatment of the patient. The latter generally constitutes a nonreciprocal risk for the patient by the doctor.

90. DAN B. DOBBS, *THE LAW OF TORTS* 13-14 (2001).

Patients are traditionally viewed as a weak and vulnerable sector of the populace compared to doctors and the powerful institutions that support them—health services and hospitals. Of course, the insurers of these institutions have much more economic power than victims. Within the overall class of patients, those who have been harmed through medical malpractice are an even more vulnerable group, particularly when the total control over information relating to negligence and treatment is in the hands of the stronger parties—the doctors and health services. Therefore, there is no reason to burden this already vulnerable sector—which has suffered physical harm as a result of medical malpractice—with the need to purchase insurance and then seek compensation from two separate parties: injurers and insurers. According to distributive justice, it would make more sense to hold injurers, i.e., doctors and health services, fully liable.

The solution of private insurance is especially problematic from the perspective of distributive justice. Why not continue to impose full liability and compensation on the doctors' insurance companies? It seems truly unfair even when we are talking about a patient who can afford to purchase insurance that would cover all of the damages, but especially when it concerns patients who cannot afford private insurance. This problematic consequence of the ORP is detrimental to all patients in general, and to indigent patients in particular. Why should we remove incentives that doctors—who are the stronger of the two parties—presently have to insure themselves fully for all of the harm they may cause a patient, regardless of the fact that some of this harm might have occurred with a certain level of probability had they chosen a nonnegligent course of action (let alone when the probability of this is low)? Is it not the doctor's insurance company that currently pays, and not the doctor himself? Is there a justification for shifting the burden to acquire private insurance from doctors to patients, to deal with the problem of defensive medicine by harming a weaker sector—and supposedly for its own benefit?

The present system is characterized by high insurance premiums, which reflect the internalization of the costs of precautionary measures and huge awards of compensation. It might be argued that the ORP would lead to a reduction in such premiums, and subsequently, the entire system would benefit because the problem of defensive medicine would fade away. Lower premiums for doctors do seem attractive. However, if patients must purchase this supplemental, private insurance, they will be forced to pay the premiums saved by doctors. This is clearly inconsistent with distributive justice since the burden falls on the weaker party. It is even more disturbing given the knowledge that victims who cannot afford private insurance will not be fully compensated for their injuries. Therefore, the ORP en-

courages the need for private insurance and would lead to a widening of social gaps, thus severely impinging on the principle of equality.<sup>91</sup>

Ultimately, for the purpose of offsetting risks, concern for the interests of third parties—especially the interests of strong parties like public authorities—can be inconsistent with principles of distributive justice.<sup>92</sup> This is especially true when the outcome harms weaker parties or even discriminates to a certain extent between them. Why?

As mentioned, operation of the ORP would create two different doctrines within negligence law and may affect, at least formally, the principle of equality, and not only in regard to supplementary compensation from social or private insurance. In a case in which the ORP does not apply, where we are not dealing with a negligent choice of action B over action A, the injured party will receive full compensation. In another case, where the OPR applies, he will receive partial compensation. In both cases we are talking about the same vulnerable sector—medical patients—and the question of whether the outcome of a claim from that sector will be full or partial compensation will depend on the arbitrary, and somewhat cruel, choice by the medical team of one or another treatment. Some injured parties will remain without any compensation at all for the difference; some others, who will supplement the compensation through social or personal insurance, will bear the economic burden of insuring themselves from the outset, as well as the burden of filing claims against two bodies instead of against one. In any event, such a situation violates equality within that sector.

A further goal which some scholars see as independent and others see as belonging to distributive justice is loss distribution.<sup>93</sup> According to this rationale, the damage should be distributed as far as possible between the various strata of society and should be removed from the shoulders of the direct injurer,<sup>94</sup> so that the latter should not be overwhelmed by the burden of compensation, while the injured party ultimately receives the compensation to which he is entitled and is not left helpless. Therefore, the trend is to impose liability spe-

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91. It is true that in the current reality, the cost of overinvestment in precautions is eventually passed on to the patient. But that would still be the situation after implementing the ORP; only then, the solution would create a larger gap between patients, whereby only some would be able to afford private insurance to ensure full compensation for their injuries, while others would be left with partial—sometimes even negligible—compensation. This is certainly not preferable to the current state of affairs.

92. Porat, *supra* note 1, at 259 (admitting this to be true while still preferring the goal of optimal deterrence, with the understanding that application of the ORP reveals the net harm caused by the injurer).

93. ENGLARD, *supra* note 56, at 55.

94. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 499 (1961); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461 (1985).

cifically so as to distribute the damage over a large number of people, thus having each individual bear a small portion of the cost of restitution or benefit without his economic or social situation being dramatically impaired. In this way, the whole of the damage does not fall solely on the injured party or on the injurer.

Here, the damage is distributed over the public as a whole, or over a group or sector relevant to that act. For example, service providers or manufacturers may factor the cost of the risk into a slight increase in the price of the product, and so distribute the damage over the consumer population—a kind of self-insurance through the population of potential injured parties.<sup>95</sup>

Another approach is to place the burden of the damage on whomever has deep pockets and can absorb the damage without affecting their social and economic status and can insure themselves. Thus, insurance companies are natural loss distributors, provided that insurance arrangements are created in line with market forces.<sup>96</sup>

Loss distribution may indeed be viewed as part of distributive justice since an equal and more appropriate distribution of resources in society depends on the ability of the parties taking part in an activity to absorb or distribute losses. In my view, this is the correct rationale since loss distribution is, in effect, a technique to apply distribution. Loss distribution to the deep pocket is indeed consistent with distributive justice and perhaps even constitutes a part thereof; imposing liability on the deep pocket means transferring wealth from the stronger to the weaker side.

For our purposes, the ORP is ostensibly consistent with loss distribution. The distribution is carried out between the injurer and those who are vicariously responsible for him (doctors, HMOs, and hospitals) on one hand, and the social or private insurance, on the other. These two bodies constitute the deep pocket, and thus it is appropriate to divide the compensation between them. Nevertheless, as noted, the distribution is not the same between these two bodies since the allocation to the second one—social or private insurance—creates a significant cost and burden on the injured party. It is doubtful whether the distribution achieves its goal, particularly when the weaker party, the one without deep pockets, bears the burdens that ultimately lead to distribution between two strong bodies, each of which has deep pockets, instead of the loss falling on the injurer; here too, the loss is distributed since the injurer has employers and insurers, and the loss is distributed between all of these through the purchase of insurance and the actual payment.

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95. CALABRESI, *supra* note 54, at 50-54.

96. *Id.* at 40-41.



However, even if the pure interest of loss distribution exists absolutely in the case of offsetting risks, it would be necessary (particularly if this goal is associated with distributive justice) to impose the whole of the liability on these two bodies, the injurer (his principals and insurers) and the social or private insurer, jointly and severally, thus allowing the injured party to sue only one of them and requiring the defendant to seek indemnification from the other body. I also suggest that if a doctor, or any other injurer, wishes to benefit from the ORP, he (or his principals or insurers) must be obligated to pay the full sum of compensation, and only thereafter make a claim from the injured party's insurer or the social insurance fund to obtain indemnification in the sum of the difference.

Having a single claim, in which the loss is divided jointly and severally, or from the outset moving the burden of payment of the full compensation sum to the doctor injurer, to his employers, or to his insurer, is only logical and fair. Why? The possible acceptance of the ORP makes the position of injurers better than the present situation. Hence, if this principle is legislated, such a mechanism could be used to provide relief to injured parties. Although this will not totally solve the fundamental problems set forth above, it will bring about a distribution of the loss in a way that is less of an imposition on injured parties.

Even an analysis of the ORP from the perspective of deterrence does not necessarily help the principle, both according to a traditional view of this goal, but also, to some extent, according to its economic aspect—efficiency.<sup>97</sup> Implementation of the ORP is likely to contribute to underdeterrence. A potential injurer should have an incentive to choose the less risky course of action, and the law should encourage people not to commit torts.<sup>98</sup>

If potential injurers knew that even if they choose the riskier course of action—the improper and unreasonable course of action from a legal perspective, one that constitutes a tort of negligence—they would not have to pay for all of the harm they caused, it might encourage them, *ab initio*, to choose the negligent course of action, or to artificially increase the risks that will be offset, or to carry out other manipulations to escape payment of full compensation.

This is particularly true when the risks offset lead to a relatively small difference between the overall harm actually caused and the

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97. Porat believes that the ORP is consistent with optimal deterrence as a derivative of the economic analysis of tort law and that the principle is basically a consequence of applying such an approach. Porat, *supra* note 1, at 247, 270, 275.

98. People sometimes inflict harm in their daily lives, but if the harmful act is not tortious, nothing wrong has been done from a legal perspective—for example, a person who opens a store next to a similar store operated by another person and thus harms the other storeowner's livelihood.

benefit to the injurer from the negligent choice; for instance, a doctor who saves the expense of additional medical tests. A reasonable person, who is not negligent, would not want to benefit from negligently choosing a riskier course of action when a less risky choice is available. The underlying assumption of the ORP is that the wrongdoer has chosen a riskier course of action and is therefore negligent. If he does not pay for all of the harm that was sustained, there may be an incentive to act negligently in certain cases.

If one of the aims of the law is to foster values, then it must not encourage a potential injurer, not even indirectly, to choose a negligent course of action, even if this choice is sometimes economically efficient, when there are nonnegligent courses of action available (even if these actions are also likely to cause harm). Furthermore, this entire matter is often only viewed from an ex post perspective because a wrongdoer is not usually able to calculate and weigh all of the relevant data before acting, especially if several nonnegligent courses of action exist and each one carries a risk of harm at varying probabilities.

The firm response of the law to the wrongdoer who has negligently chosen a riskier course of action, when one or more courses of action which are less risky were also available, must be to impose liability for all of the resulting damages. This is not overdeterrence. This only means: *Choose the proper course of action and you will pay nothing. Choose the improper course of action and you will be forced to pay for everything.* This is the just expectation of every patient and potential victim and should be the expectation of society.

This is also true in cases that do not entail medical malpractice. Porat directs our attention to the negligent advice of a lawyer or investment consultant which creates increased risks, but at the same time avoids other risks.<sup>99</sup> Would an enlightened society be willing to take into account avoided risks, the result of which would be to legitimize a tortious act? The attorney who represents both the seller and the buyer in a real estate transaction<sup>100</sup> is a blatant example of this problem. Also consider the example given by Porat of the speeding ambulance driver. Porat claims that the ORP would ensure that the driver internalizes, ab initio, the social risk that his behavior creates.<sup>101</sup> It certainly could be an example of underdeterrence;<sup>102</sup> if the driver were really to calculate and offset the risks, which would sometimes yield only a negligible difference, it might encourage him

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99. *Id.* at 252-53.

100. *Id.* at 255-56.

101. *Id.* at 254.

102. This is said without going into the question of whether it is really possible to expect a driver in such a situation to calculate the risks of driving slowly as opposed to the risks of speeding and to offset those risks in order to decide whether it is worthwhile for him to drive one way or the other—or perhaps this is just a matter of hindsight.

to behave negligently by speeding. Even if corrective justice was not the main goal taken into consideration, his action would endanger many other pedestrians and drivers, as well as his passengers. From a social perspective, this would be undesirable. The courts can be trusted to reach a balanced outcome in such cases, as they have done up to now.

Moreover, Porat discusses the trouble with prevailing law, in that it might encourage the potential injurer to overinvest in precautions due to his anticipation of liability for high damages.<sup>103</sup> In my opinion, these are the exact damages that he has caused; therefore the imposition of liability for the entire harm is fully justified. There is also a fear that injurers would become too obsessed with calculating whether or not they have more to lose than to gain. If injurers were to perform an *ex ante* calculation of offsetting risks, then there is a concern that this would constitute an incentive to behave negligently when it is worthwhile for them. Even if they would not make such a calculation in each and every case, there is a tangible fear of a negative incentive to act nonnegligently. Under ORP, potential injurers would know that, even if they are sued for their negligence, they could always try to argue that other nonnegligent courses of action would have produced a risk of harm, and that this risk must be offset. Alternatively, they could artificially increase the expected risks to be offset. A situation like this also leads to underdeterrence and to a reversal of the defensive medicine phenomenon. Therefore, this outcome is also undesirable, even more so than the continued practice of defensive medicine.

Now consider optimal deterrence. It is doubtful that preventing a risk which did not materialize is significant enough to constitute an additional benefit. Sometimes the probability of the risk even materializing is very low, and in these cases it is even less clear that preventing the small risk is an additional benefit.

Porat's starting point is that risks are taken into account as positive externalities, as a realization of the first principle presented in the introduction to this Article (the "incomplete tort"). Thus, he is trying to change the customary legal situation today. The question is whether this is sufficient to provide an overall increase in aggregated social welfare. One might say that prevention of a risk that did not materialize does not increase the aggregate social welfare, particularly when the alternative was that another risk could materialize (which did actually materialize). That being the case, the assumption of efficiency underlying the ORP appears shaky. In this I would agree with Professor John Goldberg and Professor Benjamin Zipursky, who posit that duty of care does not require the prevention of risks, only

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103. Porat, *supra* note 1, at 266-67.

of harm.<sup>104</sup> As long as the risk has not materialized, it cannot be seen as harm. And as long as it is not seen as harm, its prevention cannot be viewed as additional welfare.

In our case, the doctor's choice of treatment exposed the patient to increased risk. At the moment this risk materialized and harm was resulted, we recognize grounds for the patient to sue. It is only then that the patient becomes the "injured party." But if the risk had never materialized, we would never have given the patient the opportunity of suing for this harm (again, the first principle in the introduction to this Article). Unrealized risk should not be offset.<sup>105</sup> Furthermore, those who believe that an immaterialized risk can increase social welfare must then determine the rate as a percentage for that probability that did not materialize and must not ignore small rates of risk. How does this apply? If, from the outset, the chance of the risk materializing and harm being done is low (even if not negligible), say 10%, there is a rather feeble chance that the prevented risk would have even materialized. Therefore its ultimate prevention by the choice of another option, where risk materialized, is insignificant and should not be taken into account.

Although a risk was indeed prevented, the chance that this risk would, from the outset, have materialized was so small it should not be offset. In other words, even if we accept the problematic point of view under which offsetting the risk prevented by choosing another option is viewed as part of increasing the aggregate welfare and is thus an expression of efficiency, then when the chance of that risk being materialized is small, even as a part of a relatively large scale of damage—for example, 10% of damages totaling millions of dollars—the concept underlying the ORP is problematic.

Even if this were to be the only problem underlying the ORP, it is a weighty one since then it might be justifiable to offset more significant risks, like those greater than 50%. In this situation, ignoring the other serious problems regarding offsetting risks, the ORP might be accepted specifically for those instances in which the risk prevented from the outset was significant in terms of the risk of its materializa-

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104. John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1652 (2002) ("[T]he duty of care owed in most instances of actionable negligence is a duty to take care to avoid causing an ultimate harm, such as physical injury or property damage, not a duty to take care to avoid causing the intermediate harm of heightened risk. It is a duty to take care not to injure, rather than a duty to take care not to engage in injurious conduct that is conduct that risks causing an ultimate injury.").

105. This point of view may be challenged by saying that it may be that the risk in the treatment not chosen would not have materialized had that treatment been chosen. That is, that no harm would have occurred, and the risk materialized specifically due to the choice of treatment, and so the choice of the other treatment, which was not chosen, would ultimately have increased the patient's welfare. But the opposite may be equally argued, and so this argument is not significant.

tion. But then negligence laws would again be split into two classes, under one of which we accept the ORP only when the alternative option had a significant chance of materializing the risk. And as we have seen, applying the ORP even in cases where the chance of the risk in the nonchosen option materializing is significantly large presents problems of various types with its application, even in this limited situation.

In addition to all of that, the presumption that reducing compensation would decrease the phenomenon of defensive medicine and lead to greater social welfare requires further examination. Porat contends that a reduction in compensation awards would lead to a decrease in the phenomenon of defensive medicine.<sup>106</sup> This was the primary motivation for establishing the ORP. However, it seems that there is no research concluding unequivocally that this phenomenon is necessarily negative. It may have positive consequences regarding deterrence, even in comparison with the opposite situation where, out of exaggerated self-confidence and underdeterrence, patients would not consent to proper medical examinations and illnesses would not be discovered in time. It may be that defensive medicine increases aggregate social welfare by helping patients prevent risks and advance overall confidence, or at least does not decrease the quality of medical care, even if in certain cases patients are being exposed to unnecessary and even harmful examinations.<sup>107</sup> Therefore, research

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106. Porat, *supra* note 1, at 246, 264-66.

107. Indeed, it may be necessary to consider the problem of defensive medicine itself: the question of whether such a problem exists and whether all of its ramifications—increased litigation, the rise in the sums awarded as compensation, and the increased cost of medical services—are necessarily problematic, or only problematic. *See, e.g.*, TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 121 (2005) (“[T]he survey research does confirm that doctors believe that malpractice liability affects how they practice medicine. The most common effects that they mention are maintaining more detailed patient records, spending more time with patients, referring more cases to specialists for consultation, increasing the number of diagnostic tests, and, in earlier surveys, increasing their fees. Whether these effects are good, bad, or indifferent is impossible to tell from a survey. . . . [I]t seems quite likely that a substantial portion of this defensive medicine in fact is beneficial. But my judgments about this are pure speculation . . . .”); *id.* at 118-19 (“[M]easuring the extent of defensive medicine requires distinguishing between the good, injury-prevention effects of malpractice lawsuits and the bad, wasteful effects.”); *id.* at 119-20 (“The public and most doctors understand the term ‘defensive medicine’ to refer to something that is always and everywhere bad. Yet researchers define the term to include an indefinable but undoubtedly large proportion of activities that benefit patients.”); Alan Feigenbaum, *Special Juries: Detering Spurious Medical Malpractice Litigation in State Courts*, 24 *CARDOZO L. REV.* 1361, 1371 (2003) (“While defensive medicine may, in some instances, provide a positive contribution to patient care by increasing the likelihood of early detection of a disease or condition, it often results in physicians ordering a great many unnecessary diagnostic tests for legal rather than medical purposes.”); David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the United States: Is Malpractice Part of the Problem or Part of the Solution?*, 90 *CORNELL L. REV.* 893, 991 (2005) (“Liability apparently makes a modest positive contribution to patient safety overall, accounts for significant improvements in anesthesia safety, encourages providers to solve specific problems at specific health care insti-

is needed to substantiate the conclusions that actually led to the creation of the ORP.<sup>108</sup>

However, even if defensive medicine is a negative phenomenon that has no positive or redeeming features and should be eliminated, there still exists another difficult problem of fulfilling the goal of optimal deterrence. As noted above, the ORP is not consistent with either corrective justice or the goal of compensation because it provides only partial compensation. However, even if we were to accept the assumption that the compensation provided is full as opposed to the excessive liability under the present compensation regime, as Porat argues, it seems that it is problematic to argue honestly that the ORP is consistent with optimal deterrence. Indeed, it may be that the ORP, even if fully justified, is not optimal and goes beyond what is necessary and thus does not promote efficiency, but rather underdeterrence and unnecessary harm to the injured party.

The prevailing reality is that many victims of medical malpractice do not even sue for their damages—which is evidence of underenforcement.<sup>109</sup> This is for a variety of reasons, such as the difficulty of proving the case or the cost of filing suit; thus there is underdeterrence instead of optimal deterrence.<sup>110</sup> Recent data indicates that, in regard to relatively low sums, only 8% of all victims of medical malpractice in the United States are awarded *any* compensation—only

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tutions, and causes physicians to be more forthcoming in conversations with patients.”); *id.* at 917 (“[N]o study has shown that exposure to liability has a statistically significant negative effect on the frequency of error reports. No study has shown that liability exposure causes health care quality to decline overall. Instead, the best available evidence shows that liability makes a modest positive contribution to patient safety despite the definitive and unqualified claims to the contrary made by patient safety advocates and other critics of the tort system.”); Office of Tech. Assessment, U.S. Congress, *Defensive Medicine and Medical Malpractice* 74 (1994), available at [http://www.princeton.edu/~ota/disk1/1994/9405\\_n](http://www.princeton.edu/~ota/disk1/1994/9405_n) (“[A]lthough direct physician surveys suggest that fear of malpractice liability is widespread among physicians and that many of them practice defensive medicine, the validity of these results is highly questionable for a number of reasons—in particular, the “prompting” of physicians to cite malpractice liability concerns and response bias due to low response rates. Consequently, the results of many of these surveys probably considerably overestimate the extent of defensive medicine.”) (emphasis added).

108. Note—I am not arguing that defensive medicine is something good or beneficial for society in general. This is only an attempt to assess whether defensive medicine also has advantages, that is, whether the care taken by doctors, even if excessive, nevertheless leads to a reduction in errors and greater adherence to procedures, alongside the obvious shortcomings of this phenomenon. It is, however, an attempt to contradict Porat’s unequivocal assumption and say that perhaps we need to be less unyielding regarding the assumption of the discussion since defensive medicine may possibly bring about an increase in social welfare, even if other aspects of it tend in the other direction. We need to examine what the sum total outcome is from those increases and decreases in social welfare (should it be possible to assess this).

109. Porat, *supra* note 1, at 271; see also BAKER, *supra* note 107, at 22-44, 63; David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 628-30 (2001).

110. See Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1295-97 (1980).

40% of the 20% who decide to sue.<sup>111</sup> Other research carried out from the 1970s to the 1990s indicates that only one person in twenty-five harmed by medical negligence ever files suit.<sup>112</sup> This is underenforcement, which leads to underdeterrence, and, as Tom Baker writes regarding these data, “this fact alone would tell us that the price that doctors and hospitals are paying is much less than the cost of the medical injuries that they cause.”<sup>113</sup>

Under these circumstances, even a certain degree of overcompensation by defendants in medical malpractice cases (excessive liability in Porat’s view) would still lead wrongdoers to likely pay less than the average damages they cause.

Such low percentages of claims filed and compensation for medical malpractice may even indicate that there is a natural offsetting of risks. In most instances, people are not compensated for the harm done to them through medical negligence and, of those who do receive some compensation, many are not fully compensated. This would seem to strongly indicate that even this natural offsetting is insufficient and that ultimately the present situation, without the ORP, does not involve structural excessive liability, but rather diminished liability, or certainly no more liability than the average level of harm caused, thus providing effective and optimal deterrence. Hence it is inappropriate to reduce liability still further through application of the ORP since, based on this analysis, it could lead to underdeterrence that reduces aggregate social welfare.

In the eyes of corrective justice, which examines only the relations between the injurer and the injured, this is problematic because the natural offset means there are three types of patient-plaintiffs: one type sues and receives either reduced compensation or nothing; the second type receives the proper damages; and the third type may possibly receive more than deserved. Thus, compensation for harms appears to average out and, all in all, covers the overall damages, or perhaps even less. Nevertheless, optimal deterrence focuses on the acts of the wrongdoer; hence this natural offset may be compatible with that goal. Therefore, there is no need to legislate the ORP and

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111. Robinette, *supra* note 51, at 406-09. Nevertheless, it is hard to learn from such data since many lawsuits conclude with a judicial determination that there was no negligence and, therefore, no compensation is awarded, while in other cases insurance companies pay settlements when the nuisance value makes it more worthwhile for them.

112. Tom Baker’s book surveys various researchers that all come to this amazing conclusion (most talk of 3%, or at most 4%), among them research from California from the mid-1970s, research carried out at Harvard in the mid-1980s, two additional researches carried out at Harvard in the mid-1990s, and research carried out in Chicago, also in the mid-1990s. BAKER, *supra* note 107, at 25, 27, 63, 69.

113. *Id.* at 63.

reduce the risk more than the natural reductions present in the current system.<sup>114</sup>

Porat responds that it is difficult to quantify and evaluate the degree of enforcement in medical malpractice cases.<sup>115</sup> But as stated, data already exists on this subject. Porat also claims that “there is no reason to assume that the presence of offsetting risks is a good proxy for underenforcement that can be cured by ignoring offsetting risks altogether.”<sup>116</sup> But even if this is true, it would seem that data on such undercompensation for medical malpractice actually proves that overenforcement, insofar as it exists, does not even approach the tremendous levels of underenforcement. In my opinion, this is not really overenforcement but rather the proper degree of enforcement.<sup>117</sup> That being the case, there is no place to further reduce the magnitude of liability by the ORP. It is the existing situation, of natural risk offsetting, that is closer to optimum, rather than a structural offsetting of risks.

Furthermore, it is possible that applying the ORP might lead to a phenomenon that is the reverse of defensive medicine. Victims would believe that their chances of prevailing in medical malpractice cases are so slim that they conclude it is not worthwhile for them to file a lawsuit. This might be due to a potential plaintiff knowing that, even if he can prove a complete tort by a preponderance of the evidence, he would have to contend with arguments by the defense regarding other possible, nonnegligent courses of action that might have also resulted in harm. This would create an additional negative incentive for victims to sue, even in cases where it is clear that a wrong has been committed and harm can be proven.

An even more dramatic decrease in the number of medical malpractice lawsuits due to this fear of lack of feasibility, even in the most justified cases, would radically shift the pendulum in the opposite direction and would be a clear manifestation of underdeterrence. Furthermore, if the ORP were to be extended to cases other than medical malpractice, and risks to third parties and to society in general would be offset, then the incentive to file tort lawsuits might be reduced even more, thus causing even more overall underdeterrence.

114. Cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1126-27 (1972); Fischer, *supra* note 109, at 628-30; A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 888-89 (1998).

115. Porat, *supra* note 1, at 271.

116. *Id.* at 272.

117. In addition, this argument by Porat is unconvincing in light of the fact that, as discussed above in dealing with corrective justice, he reduces the benefit in one area to increase it in another—even though there is no real connection between the two—by offsetting risks avoided by third parties and society at large against risks actually realized by a specific victim, based on considerations of optimal deterrence.



However, even if defensive medicine were a negative phenomenon, that had no positive or redeeming features, or whose disadvantages exceeded its advantages, ORP would probably not solve, or even lessen, the problem.

Defensive medicine does not stem only from the *level* of compensation since the doctor pays nothing out of his own pocket; it is his insurer that pays. One may assume that the most important thing from the doctor's perspective is to avoid being held liable. There are many reasons for this, primarily: the fear of harm to his reputation; the fear of a disciplinary hearing; and even, in cases of wrongful death, the fear of criminal indictment. Therefore, a doctor will make every effort not to be held liable. The amount of damages awarded is not always very relevant to defensive medicine since doctors pay nothing out of pocket.<sup>118</sup> There may be instances where, from the doctor's perspective, it makes no difference if his liability is found to be \$1000 or \$5000—what matters to the doctor is that he has been held liable and found negligent.

The amount of compensation is naturally relevant to the insurance company and, to a certain degree, medical services and hospitals that have vicarious liability over the doctors as well due to the cost of premiums they pay to the insurance companies. Although there are doctors who insure themselves, in many cases doctors are insured by HMOs and hospitals, and the only thing they have to be concerned about is a finding that they have been negligent. At the same time, in many instances the premiums are so high that many doctors are reluctant to specialize in certain fields;<sup>119</sup> it is the number of suits and not just their outcomes that influences premium levels as a result of the high costs of litigation.

The absence of precise data for the offsetting risks formula is another problem. As we have seen, the ORP requires complicated calculations. As a possible answer to arguments addressing the need for additional information and calculations that would complicate matters and make litigation more costly, Porat argues that the courts do not really need to perform precise calculations and place real numbers in the formula to apply the ORP.<sup>120</sup> He does not expect courts to actually act according to the formula since they would often face difficulty in calculating the expected harms. Instead he contends that

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118. It may be assumed that a doctor with insurance coverage, whether a young doctor just starting out, or a senior physician with an established reputation, would prefer to pay more or have his insurer pay more as part of a compromised arrangement, without admitting fault, rather than lose his reputation. Hence, doctors may certainly push toward such arrangements, even if this increases their insurance premiums later.

119. See, e.g., Chandler Gregg, *The Medical Malpractice Crisis: A Problem with No Answer?*, 70 MO. L. REV. 307 (2005).

120. Porat, *supra* note 1, at 251-52, 272-73 (explaining the formula Porat presents).

the legislature should give the court a “menu” of options from which it would choose the correct formula for compensation under given circumstances, therefore making it unnecessary for the court to make precise calculations of expected harms.<sup>121</sup> He suggests that the legislator can rule that in certain cases full compensation would be given, or two-thirds, one-half, etc.

However, even if the courts would not place precise numbers in the formula, there would at least be a need for rough estimations for the application of the ORP. Assuming that people are calculating or prudent, or that they might be offered incentives to be calculated or prudent, an assumption that lies at the basis of the economic approach, potential injurers who want to determine whether their activity would be considered negligent and whether or not they would benefit from offsetting risks—and, if so, to what degree they may benefit—would want to do it in advance, even if only as a rough estimation, for the sake of their defense at trial. Victims who wish to sue would want to do it as well, and so would courts adjudicating such cases.

Thus the ORP impairs legal certainty and stability because the risks cannot be calculated and offset in advance. The moment a legal principle rests on a mathematical calculation, by definition, it must at least be proven approximately. It seems that the ORP, as presented by Porat, does not even allow for rough estimation of the offsetting risks and, without quantifiable data, the formula has a slim application. One cannot be satisfied with the general declaration that there is a certain risk in the alternative course of action that was not chosen and therefore courts should offset some risk from the risk that materialized. This is too fluid.

The ORP does not deal with the question of whether or not to impose liability (since it is already given that the wrongdoer had chosen negligently the riskier course of action), but rather which acts should or should not cause liability, a matter that affects the degree of the compensation that should be imposed. Therefore, without precise—or at least approximate—data, it is not possible to offset one risk from another and arrive at a given amount of compensation. But, as already noted, it appears that even approximate data will not be available since it is impossible to prove that the risk of a course of action not chosen would actually be realized for a specific victim. Every person might react differently to the same medical treatment. Some will be harmed and some will not, and there will be no true indication as to whether the victim would have been harmed by the use of a different treatment.

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121. *Id.* at 273.

A possible response to this is Porat's proposal—to divide negligence law into different classes of cases and, for each, have the legislature determine what percentage, if any, the courts are to deduct. This proposal is not just arbitrary. It presents a general, approximate formula for offsetting risks, a formula which may well be ineffective. If we accept the assumption that an exact, or even approximate, offsetting of risks leads to exact and not heavy or excessive liability, such liability fixed in advance in tables of percentages would certainly not be exact enough to reach a so-called net liability. It would be greater or less, depending on the circumstances, and may undermine the purpose of the ORP as presented.

Moreover, such a determination *ab initio* is contrary to rectifying the harm exactly, as required by corrective justice. The ORP requires making a general formula available to each and every citizen, something that Porat himself solves by having it established in law. However, the question is whether the legislature would be willing to take such a step and predetermine various forms of compensation in line with offsetting risks for each group of cases in negligence law. Perhaps apart from all these problems there is the concern that such legislation would create a further subdivision within negligence law created as a direct result of applying the ORP.

But even if approximate data could be placed in the formula in each individual case, its use is still problematic. One might question whether a person, especially a private individual acting spontaneously, calculates risks and acts rationally—and not instinctively—in considering this calculation.<sup>122</sup> For example, in a fault-based liability regime, a person who drives faster than allowed or does not obey a traffic sign and thus gains time would find it difficult to calculate whether it was really worthwhile for him in terms of increased probability of a road accident versus the choice of a less risky course of action. In the same way, a pedestrian who takes a shortcut, and thus trespasses and damages flowers in a person's garden, does not calculate precisely, or even approximately, the precautions versus the expected harm of both alternatives. Therefore he does not offset, even in a rough estimation, the risks to find his so-called net liability. It is even harder to say that, in a fight between two people, each of them actually calculates his gains from hitting the other. The same is also true with nuisances between neighbors, domestic violence, and other common tortious acts since many of them are derived from emotion.

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122. This is different from a large commercial economic body that usually employs a risk management function. It may be that a doctor, as a professional, would be a bit more prudent than the average private wrongdoer, although this question itself should be examined too.

Hence the question arises not only whether the calculation of the ORP is feasible, but whether there is some reasonable expectation that potential injurers, particularly private individuals—who tend to be spontaneous and not overly calculated—would make use of this and really plan their actions so as to reduce the number of accidents and their costs and increase the aggregate welfare. The economic perspective would answer in the affirmative. A person or organization ought to be calculating. If not, then the incentive inherent in optimal deterrence is supposed to make him so. If deterrence does not work, and he causes harm, he ought to pay.

Other monistic perspectives would offer different responses, and the various pluralistic approaches would respond differently depending on the relative dominance of optimal deterrence within each pluralistic approach. The possibility of incorporating numbers in the ORP formula is rather limited, perhaps almost nonexistent, for potential individual injurers who are spontaneous and imprudent. It is likely more relevant to large organizations which calculate risks and manage them. Thus, this possibility is problematic and may lead to a further division within negligence law: between those for which data might be provided or for which a conceptual framework might be offered, as Porat intends, and those for which this would be impossible.

This last critique is more akin to a criticism of the applicability of the formula than of the ideas underlying the ORP. Even so, it is an important one. If, as mentioned above, the problem is solved by setting up a range of compensation options for each class of cases, it would be hard to argue for spontaneity and imprudence; we would be left with another problematic division of negligence law based on classes of cases, as can be seen from analysis of the ORP and its application.

Apart from this, even if there were no problems from the point of view of optimal deterrence regarding offsetting risks, in some of the categories in which the ORP would apply (such as that of a lawyer representing both parties in an apartment purchase or offsetting environmental risks from bodily risks), optimal deterrence should be suitably restricted by the moral considerations of corrective justice. Even then, the application of a moral outcome leads to the nonapplication of the ORP. This creates another problem from the point of view of an additional subdivision in negligence law.

To sum up, one should not ignore that the ORP, as proposed by Porat, appears adverse to most of the goals of tort law. It is no wonder that Porat attempts to find supplementary mechanisms such as social or private insurance, but even these solutions are inherently problematic, especially given their incompatibility with the underlying goals of tort law.

## VI. CONCLUSION

According to the ORP as presented by Porat, the risk actually realized by the negligent choice of a certain course of action is offset against the risk that was not realized from another course of action with a lower expected harm. The only liability imposed on the injurer is the differential that results by offsetting these risks. This principle, which was meant to solve or lessen the defensive medicine problem and thus to reduce costs, and which Porat carefully proposes to extend to all cases of negligence, raises serious questions, both theoretical and practical.

In this Article, the ORP has been criticized from numerous perspectives. This critique is not limited to its basic adversity to most of the goals of tort law. Even if the principle was consistent with all of these goals, it seems that many practical fissures remain at its core. The principle is both inherently and fundamentally flawed to the extent that it is doubtful if it is possible to apply it in practice, or even in approximation.<sup>123</sup>

Even if the principle's application were feasible, it appears that it would actually increase litigation costs and evidentiary barriers given the need to employ the services of additional expert witnesses in the fields of medicine and statistics as a matter of routine. It would not only require that the victim go through the trouble of suing the injurer, but would also require that he file a claim against the social or private insurer, if he can afford such private insurance, to supplement his compensation. Significant criticism was also applied to this solution, and it was proposed, as a default if the ORP is to be applied, that the stronger party (doctor, insurance) would be required to fully compensate the injured party, and only then to turn to the injured party's insurance company to obtain indemnification for the difference.

Finally, this Article does not argue that the present state of the law of negligence in general, and medical malpractice in particular, is satisfactory. However, any proposal to convert the field of medical malpractice into a regime of strict liability or the like demands a separate discussion<sup>124</sup> and examination of additional proposals that have

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123. Other suggestions that were raised for the problem of defensive medicine should be dealt with separately. See Hylton, *supra* note 1, at 1, 5 (agreeing in principal with Porat and Cooter's suggestions for the problem of defensive medicine, disagreeing with them only at the level of some of the details and suggesting some alternative solutions, among them the adoption of a more careful analysis of factual causation or reducing the likelihood of judicial error—for example by having medical professionals serve as neutral expert advisors to courts). In any event, these solutions are specific to cases of medical malpractice, which are the basis of Cooter and Porat's article, and are not relevant to all cases of negligence, as can be seen from Porat's proposal in his later articles. See Cooter & Porat, *supra* note 1.

124. See Porat, *supra* note 1, at 273-75 (attempting to present other alternatives, which are less satisfactory in his view, but from the outset noting that an extensive discussion of these alternatives is beyond the scope of the questions discussed in his article).

already been raised.<sup>125</sup> Given that there is, in practice, underenforcement since most injured patients do not sue, one could expect solutions that would incentivize the filing of suits and getting full compensation. If defensive medicine, the elimination of which underlies the idea of the ORP, is indeed so bad, maybe the prevailing situation is the lesser of two evils and better than any other alternative.

Part of the risk management carried out by large bodies such as hospitals, health services, and their insurers is aimed at decreasing risks in a positive and effective way through the improvement of safety and not by exposing the patient to new risks created by over-defense. Indeed, not all risk management is defensive medicine. But despite this, the defensive medicine phenomenon exists, even if only in certain areas. Notwithstanding the desire to solve difficult problems existing in the field of medical malpractice (if we accept the assumption that these offer no advantages), and especially through a principle that, in a sense, was proposed to apply to the laws of negligence in general, it seems that the ORP has too many underlying problems for it to represent an appropriate solution. Nevertheless, if the inherent problems in the basis of the ORP could be solved, or at least lessened, and the extent of the difference proven, even if only in rough estimation, there may be a place to implement this innovative principle in practice. In the present situation, given the problems that it raises, it is hard to believe that these difficulties can be overcome, and the ORP be made consistent with the goals of tort law.

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125. See, e.g., Jeffrey O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137 (2000) (proposing a unique solution for bodily injury cases).